Oct 25 1874
Submitted

5-19

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 46.

A. G. ADAMS & CO., H. B. BUCKNER, TRUSTEE, J. BLOOMSTEIN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND CITY COUNCIL OF NASHVILLE, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JANUARY 29, 1875.

Oct 27 1874 Withdrawn

SUPREME COURT OF THE UNITED STATES.

No. 46.

A. G. ADAMS & CO., H. B. BUCKNER, TRUSTEE, J. BLOOMSTEIN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE MAYOR AND CITY COUNCIL OF NASHVILLE, TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

INDEX.

	Original.	Print.
Writ of error	1	1
Bill of complaint	5	2
Exhibit A	20	6
Injunction	25	9
Subpœna	28	10
Decree	29	10
Demurrer	30	11
Final decree	33	12
Appeal-bond	34	12
Decree of supreme court	38	13
Bond	41	14
Opinion	43	14
Clerk's certificate	45	15

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of Tennessee, greeting:

Because in the record and proceedings, as also in the rendition of the judgement of a plea which is in the said supreme court of Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. G. Adams & Co., H. B. Buckner, trustee, J. Bloomstein, John M. Barr, W. T. Berry & Co., M. H. Bonner, R. B. Cheatham, R. C. Collier, Cline & Bernheim, J. M. Carsey, R. H. Gardner, Henry Hensley, Ed. Kelly, Ed. Kelly, trustee, R. C. McNairy, H. W. Morgan, M. E. Nichol, John Porterfield, Thomas Plater, Samuel Pritchett, M'r's M. E. Porterfield, James Simmons, Delia Simmons, H. C. Shaphard, Robert Thompson, G. P. Thurston, Rob't F. Woods, J. P. Williams, James Whitworth, A. L. Landis, J. W. Thomas, Henry N. Compton, Hu. Douglas, M'r's N. K. Griffin, N. K. Griffin, Henry Hart, Van L. Kirkman, O. F. Noel, E. F. Noel, Leslie Warner, William Connell, Samuel Wallace, J. W. Walton, James Alexander, Burrill Bender, Samuel Nicholson, T. W. Nicholson, L. B. Fite, H. C. Ellis, F. G. Harris, T. Harris, A. O. Towson M'r's O. Allison, W. P. Ingnam, Jno. F. Morgan, C. Morgan, W'm Parks, A. M. Morgan, W. S. Alexander & Co., R. C. Alexander,
2 R. L. Alexander, J. M. Myers, J. H. Young, M'r's N. E. Young, A. R. Hall, M. R. Morgan, Samuel Carpenter, Mary Miller, S. F. Glass, John B. McEwen, W. P. Hume, B. W. McCrea, George Swayden, H. M. Spofford, A. H. Blanchard, Mary A. Baird, Mary A. Baird, ex'x, T. T. Hillman, G. F. Mayden, complainants, against The Mayor, and City Council of Nashville, Tennessee, defendants, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the laws of the United States, and this decision was in favor of such their validity, and wherein was drawn in question the construction of a statute of the United States, and this decision was against the title, right, privilege, or exemption specially set up or claimed under such statute, a manifest error hath happened to the great damage of the said complainants, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme
3 Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the fourteenth of March, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.]

E. R. CAMPBELL,
Clerk of the Circuit Court of the United States for the Middle District of Tennessee.

Allowed by—

A. O. P. NICHOLSON,
Chief-Justice of Tennessee.

4 The defendants waive citation and acknowledge service of this writ of error.

Nashville, March 14, 1874.

JOHN L. MYETT,
Att'y for Defendants.

(Indorsed:) A. G. Adams et al. vs. Mayor & City Council of Nashville. Writ of error. Filed Mar. 14, 1874. F. C. Dunnington, cl'k.

5 In chancery, at Nashville.

STATE OF TENNESSEE,
Davidson County:

At the April term, 1872, of the chancery court, at Nashville, the following proceedings were had in the cause wherein A. G. Adams and others are complainants and the Mayor and City Council of Nashville are defendants:

Orig. bill.

To the Honl. E. H. East, chancellor, &c., holding the chancery court at Nashville, Tennessee:

The bill of complaint of A. G. Adams & Co., H. B. Buckner, trustee, J. Bloomstein, Jno. M. Bass, W. T. Berry & Co., M. H. Bonner, R. B. Cheatham, R. C. Collier, Cline and Bernheim, J. M. Carsey, R. H. Gardner, Henry Hensley, Ed. Kelly, Ed. Kelly, trustee, &c., R. C. McNairy, H. W. Morgan, M. E. Nichol, John Porterfield, Thomas Plater, Samuel Pritchett, M'r's M. E. Porterfield, James Simmonds, Delia Simmonds, H. C. Shapard, Robert Thompson, G. P. Thurston, Rob't F. Woods,
6 J. P. Williams, James Whitworth, A. L. Landis, J. W. Thomas, Henry W. Compton, Hu. Douglass, M'r's N. K. Griffin and N. K. Griffin, Henry Hart, Van L. Kirkman, O. F. Noel, E. T. Noel, Leslie Warner, and William Connell, citizens of Davidson County, Tennessee; Samuel Wallace, J. W. Walton, James Alexander, Burrill Bender, Samuel Nicholson, T. W. Nicholson, and L. B. Fite, citizens of Sumner Co., Tennessee; H. C. Ellis, T. G. Harris, T. Harris, A. O. Towson, citizens of Trousdale County, Tennessee; M'r's O. Allison, W. P. Ingram, John T. Morgan, C. Morgan, and William Park, citizens of Maury County, Tennessee; A. W. Morgan, a citizen of Coffee County; W. S. Alexander & Co., R. C. Alexander, R. L. Alexander, J. M. Myers, J. H. Young, and M'r's N. E. Young, citizens of Smith Co., Tennessee; A. R. Hall,
7 a citizen of Carroll Co., Tennessee; M. R. Morgan, citizen of Rutherford County, Tennessee; Samuel Carpenter, citizen of Bedford County, Tennessee; Mary Miller, citizen of Robertson County, Tennessee; S. F. Glass and John B. McEwin, citizens of Williamson County, Tennessee; W. P. Hume, B. W. McCrea, and Geo. Swayden, citizens of Montgomery County, Tennessee; H. M. Spofford, a citizen of Giles County, Tennessee; A. H. Blanchard, a citizen of the State of Indiana; Mary A. Baird, Mary A. Baird, executrix; T. T. Hillman, and G. T. Mayden, citizens of the State of Kentucky, against The Mayor and City Council of Nashville, Tennessee, a municipal corporation chartered by the legislature of the State of Tennessee, having its chief
8 place of business at Nashville, Davidson County, in said State, humbly complaining, your orators would show unto your honor that, under an act of Congress approved June 3rd, 1864, and acts amenda-

tory thereof, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, the Fourth National Bank of Nashville was duly incorporated and organized, with an original capital of two hundred thousand dollars; that said bank was organized in strict conformity to said laws, and received a certificate under the hand and official seal of the Comptroller of the Currency; that it had complied with all the provisions of said act, and was authorized to commence the business of banking, as defined in said act.

That afterwards the stock of said bank was increased to five
9 hundred thousand dollars, as provided for in said act; that the shares of stock in said bank each represent one hundred dollars, and your orators are the owners and holders of the number of shares in said bank which are set opposite their respective names in a paper herewith filed, marked "Exhibit A," and prayed to be taken as a part hereof, as fully as if herein set forth; that said bank is located and has its place of business at Nashville, in Davidson County, Tennessee; and five hundred thousand dollars of the capital stock is invested in bonds of the United States.

That under the amendatory acts of Congress, approved February 10, 1868, it is provided that the legislature of each State may determine and direct the manner and plan of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other
10 moneyed capital in the hands of the individual citizens of said State. (15 Stat. at Large, p. 34.)

That under an act of the legislature of the State of Tennessee, passed February 25, 1870, it is provided that all the shares of stock in any bank, institution, or company now or hereafter incorporated by or in pursuance of any law of this State or of any other State * * * shall be valued and assessed and subject to taxation for all State and county purposes at the rate of twenty cents on the hundred dollars so assessed and valued; afterwards increased to sixty cents.

By an act of said legislature, passed January 23, 1871, it is provided that the several counties and incorporated towns are authorized to impose taxes for county and corporation purposes, upon condition that all taxable property shall be taxed according to its value upon the principle established in regard to State taxation, and that the taxes voted by county, city, or town shall not be greater than the State taxes
11 on property and polls. The State of Tennessee has levied a tax of $\frac{6}{10}$th' of one per cent. upon the assessed value of your orator's shares in said bank, the county of Davidson has levied an additional tax of something over one per cent. upon them, and the defendant, The Mayor and City Council of Nashville, a municipal corporation chartered by the legislature of Tennessee, have levied another tax, in addition to both the State and county taxes, of two per cent. on the nominal value of complainants' said shares. The tax assessed by the defendants against each of your orators is set forth opposite their respective names in the Exhibit A before referred to, and the aggregate amount assessed against them for the years 1870 and 1871 is the sum of ten thousand and ninety-eight dollars.

Your orators insist that it is a condition-precedent to the right even of the State of Tennessee to tax their shares in said bank that they shall not be taxed at a greater rate than is assessed upon
12 other moneyed capital in the hands of individual citizens of said State, and yet your orators aver that, by an act of the legislature

of said State, passed March 1st, 1869, "all interest-paying State, county, or corporation bonds owned by citizens of this State shall be exempt from taxation." This act, they are advised, is still in force, and many hundreds of thousands of dollars of the moneyed capital in the hands of individual citizens of said State are now, and were when said taxes were assessed against your orators, invested in such State, county, and corporation bonds as are by said act exempt from taxation, and therefore your orators' shares are taxed at a greater rate than is assessed upon the capital invested in said bonds.

By another act passed by said legislature on the 1st March, 1869, and which has been in force ever since, it is provided "That no
13 tax shall hereafter be assessed upon the capital of any bank or banking association or any joint-stock company organized under the authority of this State or of the United States, but the stockholders in such bank or banking associations or other corporations shall be assessed and taxed on the value of their shares of stock therein; and your orators insist that, while such taxation is apparently equal as to the shares of stockholders in said banks and corporations, yet, as the capital stock of such banks and corporations is exempt from taxation, the rate of taxation is not equal as between them and your orators. In order to produce equality, complainants insist that the capital stock of all corporations, meaning thereby "the whole undivided fund paid in by the stockholders, (the legal right to which is vested in the corporation,") should be taxed at its fair cash value as well as the shares of the stockholders in such corporations. The property owned by the corpo-
14 ration is as distinct from the shares owned by the individual stockholders as if they had no connexion with each other whatever, and the failure to tax the capital of the various banks and corporations in the State makes the tax on shareholders in national banks unequal and oppressive.

Your orators further show and insist that the State of Tennessee had no power or right to authorize the defendants to impose a tax on complainants' shares of stock for corporation-purposes; but, if such power could be conferred, they insist that defendants were bound to exercise it upon the same conditions as the State itself, to wit, that such shares should not be taxed by defendants' corporation at a higher or greater rate than other moneyed capital in the hands of other individuals; and yet complainants will show that on the day of , 1870, the defendants' corporation issued their bonds to the amount of five hundred thousand dollars, and on the 18th April, 1870, passed an ordinance
15 "that the said bonds shall be exempt from taxation by said corporation, this provision being intended as a stipulation in the contract;" and complainants aver that said ordinance was copied upon the back of each of said bonds, and is referred to in the face thereof, and many thousands of dollars of the moneyed capital of private individuals in said corporation has been and is now invested in said bonds, and thus exempted from all municipal taxes.

By another ordinance, passed by defendants' corporation March 1, 1867, and which is still in force, only one per cent. is assessed for taxes on the capital invested in the mercantile business in said city, while complainants are assessed two per cent. upon the value of their shares.

Complainants insist, for the foregoing reasons, that the tax assessed against them for the purposes of defendants' corporation is illegal
16 and void, and that defendants have no right to collect the same; but nevertheless they are proceeding to do so by distress-war-

rants, and will levy upon and sell complainants' shares in said bank unless restrained by your honor's court.

Complainants further show that defendants' corporation is utterly insolvent, numbers of executions having been returned no property to be found, against it; and under an act of the legislature of said State, passed July 8, 1870, all the property, whether real or personal, held or owned by either of the municipal corporations in this State for public purposes shall be exempt from attachment or sale by execution, or other legal process, and defendants' corporation do not hold or own any property, real or personal, which is not exempt under the operation of said act.

Complainants further show that B. W. McCann, revenue collector of defendants' corporation, while he may have a small amount of
17 property, is wholly unable to respond in damages for the large amount that would be recoverable against him should the tax above complained of be decided against defendants; and therefor' if complainants are required to pay said tax the loss will be irreparable, as it will be utterly impossible to recover it back, either from the revenue-collector or from the defendants.

Complainants are willing, if the court should require it of them, to execute a bond, in any penalty to be fixed by the court, to pay said tax within five days from the rendition of a final decree in the Supreme Court of the United States, sustaining the validity thereof, or, if demanded by the court, they will, as a condition of obtaining the injunction, pay the amount of said tax as assessed against them into the office of the clerk and master of this court, to be loaned out by him on good personal security until the final determination of this cause.

18 Complainants are aware that the supreme court of the State, at its present term, has held that the State could rightfully exempt its own bonds, as well as county and corporation bonds, from taxation without invalidating the tax on shares of stock in the national banks, and also that the State could authorize counties and municipal corporations to tax them, in addition to the State. The parties interested in them intend carrying them to the Supreme Court of the United States, but defendants' corporation are unwilling to let complainants' case abide the decision.

None of the other questions submitted in this bill have been passed upon by the Supreme Court, and whatever might be your honor's opinion of their merit in advance of a final hearing, they are advised that you will protect them until they can obtain the decision of the court of last resort upon their rights.

The premises considered, complainants pray that The Mayor
19 and City Council of Nashville be made defendants and required to answer this bill according to the course of this court.

That an injunction issue to enjoin said defendants from attempting in any way to collect from complainants, or either of them, the tax assessed upon complainants' shares of stock in the Fourth National Bank of Nashville until the final hearing of this cause, and that said injunction be made perpetual, and said taxes as assessed for the purposes of defendants' corporation be declared illegal and void. This is the first application for such injunction.

And may your honor have such other and further relief as in equity they may be entitled to; as in duty bound they will ever pray, &c.

SMITH, BAXTER & ALLISON,

Sol's.

Personally appeared James Whitworth, one of the above-named
20 complainants, and made oath that the facts stated in the foregoing bill are true to the best of his knowledge, information, and belief.

JAMES WHITWORTH.

Sworn to and subscribed before me 12th Febr'y, 1872.

J. WALKER, *D. C. & M.*

Fiat.

To the clerk and master:

Upon complainant's paying into court the taxes respectively due from each, as stated in the foregoing bill, you will issue the injunction as prayed for.

EDWARD H. EAST,
Chancellor.

FEBR'Y 13, '72.

We are security for the costs of this cause.

SMITH, BAXTER & ALLISON.

Filed Febr'y 13th, 1872, at 9.30 a. m.

EXHIBIT A.

Names of stockholders.	No. shares owned in 1871.	No. shares owned in 1870 unpaid.	Am't of taxes for 1871.	Total amount of taxes for 1870 & 1871.
NASHVILLE.				
A. G. Adams	50		100	100
Buckner, trust., H. B	15		30	30
Bloomstein, J	77	70	154	294
Bass Jno. M	10		20	20
Berry & Co., W. T	10		20	20
Bonner, M. H	200		400	400
21 Cheatham, R. B	22		44	44
Collier, R. C	60		120	120
Cline & Bernhiem	30		60	60
Carsey, J. M	10		20	20
Gardner, R. H	250		500	500
Hensley, Henry	11		22	22
Kelly, Ed	30		60	60
Kelly, (trustee, &c.,) Ed	20		40	40
Morgan, W. H	20		40	40
McNairy, R. C	22	20	44	84
Morgan, H. W	1		2	2
Nichol, Mrs. M. E	85	50	170	270
Porterfield, John	201	100	402	602
Plater, Thomas	110	100	220	420
Pritchett, Samuel	50	40	100	100
Porterfield, Mrs. M. E	11		22	22
Simmons, James	50		100	100
Simmons, Mrs. Delia	10		20	20

EXHIBIT A—Continued.

Names of stockholders.	No. shares owned in 1871.	No. shares owned in 1870 unpaid.	Am't of taxes for 1871.	Total amount of taxes for 1870 & 1871.
NASHVILLE—Continued.				
Shapard, H. C	11	10	22	42
Thompson, Ro	15	.....	30	30
Thruston, G. P	100	.....	200	200
Woods, R. F	22	20	44	84
Williams, J. P	27	.....	54	54
Whitworth, James	60	50	120	220
22 Landis, A. L	25	.....	50	50
Thomas, J. W	10	.....	20	20
DAVIDSON COUNTY.				
Compton, Henry W	11	10	22	42
Douglass, Hugh	105	.....	210	210
Griffin, Mrs. N. K	77	70	154	294
Hart, Henry	11	.....	22	22
Kirkman, V. L	50	.....	100	100
Noel, O. F	130	105	260	470
Noel, E. T	20	.....	40	40
Warner, Leslie	2	.....	4	4
Connell, W'm	10	.....	20	20
SUMNER COUNTY.				
Alexander, James	30	.....	60	60
Bender, Burrell	50	.....	100	100
Fite, L. B	80	.....	160	160
Nickelson, Sam'l	50	.....	100	100
Nickelson, T. W	10	.....	20	20
Wallace, Sam'l	60	.....	120	120
Walton, J. W	100	.....	200	200
TROUSDALE COUNTY.				
Towson, A. C	50	30	100	160
Ellis, H. C	25	.....	50	50
23 Harris, F. G	50	.....	100	100
Harris, S. T	50	.....	100	100
MAURY COUNTY.				
Allison, Mrs. O	10	.....	20	20
Ingram, W. P	80	.....	160	160
Morgan, Jno. T	119	45	238	328
Morgan, C	100	25	200	250
Park, W'm	37	20	74	114
COFFEE COUNTY.				
Morgan, A. M	105	50	210	310
SMITH COUNTY.				
Alexander & Co., W. S	100	.....	200	200
Alexander, R. C	50	.....	100	100

EXHIBIT A—Continued.

Names of stockholders.	No. shares owned in 1871.	No. shares owned in 1870 unpaid.	Am't of taxes for 1871.	Total amount of taxes for 1870 & 1871.
SMITH COUNTY—Continued.				
Alexander, R. L	10	.....	20	20
Myers, J. W	11	10	22	42
Young, J. H	62	20	124	164
Young, Mrs. N. E	1	.....	2	2
CARROLL COUNTY.				
Hall, A. R	10	.....	20	20
RUTHERFORD COUNTY.				
Morgan, Mrs. M. R	33	.....	66	66
24 BEDFORD COUNTY.				
Carpenter, Samuel	50	.....	100	100
ROBERTSON CO.				
Miller, Mary A	100	.....	200	200
WILLIAMSON COUNTY.				
Glass, S. F	100	.....	200	200
McEwen, Jno. B	50	.....	100	100
HICKMAN COUNTY.				
Graham, S. L	100	.....	200	200
MONTGOMERY COUNTY.				
Hume, W. P	30	.....	60	60
McCrea, B. W	60	.....	120	120
Suader, George	50	.....	100	100
GILES CO.				
Spofford, H. M	50	40	100	180
INDIANA.				
Blanchard, A. H	100	.....	200	200
KENTUCKY.				
Baird, Mary A	20	.....	40	40
Baird, ex't'x, Mary A	30	.....	60	60
Hillman, T. T	50	.....	100	100
Suader, J. F	50	.....	100	100

25 1872, FEBRUARY 13.

Ten thousand and ninety-eight dollars was this day deposited in pursuance of the fiat of the chancellor, endorsed on this bill.

NATHANIEL BAXTER, J'R,
Clerk & Master.

Injunction writ.

STATE OF TENNESSEE:

To the mayor and city council of Nashville, and to their counsellors, attorneys, solicitors, and agents, and each and every one of them, greeting:

Whereas, in a certain suit this day instituted in our court of chancery, at Nashville, by A. G. Adams and others, complainants, against The Mayor and City Council of Nashville, defendants, the complainants having obtained from the Honl. Edward H. East, chancellor, &c., a fiat for a writ of injunction to issue, to enjoin the said Mayor and City Council of Nashville from attempting in any way to collect from complainants, whose names are herein underwritten, or either of them, the tax
26 assessed upon complainants' shares of stock in the Fourth National Bank of Nashville until the further orders of this court, complainants, A. G. Adams, H. B. Buckner, trustee, J. Bloomstein, John M. Bass, W. T. Berry & Co., M. H. Bonner, R. B. Cheatham, R. C. Collier, Cline & Bernheim, J. M. Carsey, R. H. Gardner, Henry Hensley, Ed. Kelly, Ed. Kelly, trustee, R. C. McNairy, H. W. Morgan, M. E. Nichol, John Porterfield, Thomas Plater, Sam'l Pritchett, Mrs. M. E. Porterfield, James Simmons, Delia Simmons, H. C. Shapard, R. Thompson, G. P. Thruston, R. F. Woods, J. P. Williams, Ja's Whitworth, A. L. Landis, J. W. Thomas, H. W. Compton, Hugh Douglass, Mrs. N. K. Griffin, N. K. Griffin, Henry Hart, V. L. Kirkman, O. F. Noel, E. T. Noel, L. Warner, W'm Connell, S. Wallace, N. W. Walton, J. Alexander, B. Bender, Sam'l Nickelson, T. W. Nickelson, L. B. Fite, H. C. Ellis, F G. Harris, T. Harris, A. C. Towson, W'm O. Allison, W. P. Ingram, Jno. T. Morgan, C. Morgan, W'm Parks, A. M. Morgan, W. S. Alexander & Co., R. C. Alexander, R. L. Alexander, J. M. Myers, J. H
27 Young, Mrs. N. E. Young, A. R. Hall, M. R. Morgan, Samuel Carpenter, Mary Miller, S. F. Glass, John B. McEwen, Sam'l L. Graham, W. P. House, B. W. McCrae, George Swayden, H. M. Spofford, A. H. Blanchard, Mary A. Baird, Mary A. Baird, ex'x, T. T. Hillman, and G. F. Swayden, and the complainants having complied with the conditions imposed by said fiat, we, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said Mayor and City Council of Nashville, and all and every person before mentioned, under the penalty prescribed by law, of your and every of your goods, lands, and tenements, to be levied to our use, that you, and every one of you, do absolutely desist from attempting in any way to collect from said complainants, or either of them, the tax so assessed as above mentioned until hearing of this cause in our said court of chancery.

28 Witness Nathaniel Baxter, j'r, clerk and master of our said court, at office the first Monday in October, in the year of our Lord

EXHIBIT A—Continued.

Names of stockholders.	No. shares owned in 1871.	No. shares owned in 1870 unpaid.	Am't of taxes for 1871.	Total amount of taxes for 1870 & 1871.
SMITH COUNTY—Continued.				
Alexander, R. L	10	.....	20	20
Myers, J. W	11	10	22	42
Young, J. H	62	20	124	164
Young, Mrs. N. E	1	.....	2	2
CARROLL COUNTY.				
Hall, A. R	10	.....	20	20
RUTHERFORD COUNTY.				
Morgan, Mrs. M. R	33	.....	66	66
24 BEDFORD COUNTY.				
Carpenter, Samuel	50	.....	100	100
ROBERTSON CO.				
Miller, Mary A	100	.....	200	200
WILLIAMSON COUNTY.				
Glass, S. F	100	.....	200	200
McEwen, Jno. B	50	.....	100	100
HICKMAN COUNTY.				
Graham, S. L	100	.....	200	200
MONTGOMERY COUNTY.				
Hume, W. P	30	.....	60	60
McCrea, B. W	60	.....	120	120
Suader, George	50	.....	100	100
GILES CO.				
Spofford, H. M	50	40	100	180
INDIANA.				
Blanchard, A. H	100	.....	200	200
KENTUCKY.				
Baird, Mary A	20	.....	40	40
Baird, ex't'x, Mary A	30	.....	60	60
Hillman, T. T	50	.....	100	100
Suader, J. F	50	.....	100	100

25 1872, FEBRUARY 13.

Ten thousand and ninety-eight dollars was this day deposited in pursuance of the fiat of the chancellor, endorsed on this bill.

NATHANIEL BAXTER, J'R,
Clerk & Master.

Injunction writ.

STATE OF TENNESSEE:

To the mayor and city council of Nashville, and to their counsellors, attorneys, solicitors, and agents, and each and every one of them, greeting:

Whereas, in a certain suit this day instituted in our court of chancery, at Nashville, by A. G. Adams and others, complainants, against The Mayor and City Council of Nashville, defendants, the complainants having obtained from the Honl. Edward H. East, chancellor, &c., a fiat for a writ of injunction to issue, to enjoin the said Mayor and City Council of Nashville from attempting in any way to collect from complainants, whose names are herein underwritten, or either of them, the tax
26 assessed upon complainants' shares of stock in the Fourth National Bank of Nashville until the further orders of this court, complainants, A. G. Adams, H. B. Buckner, trustee, J. Bloomstein, John M. Bass, W. T. Berry & Co., M. H. Bonner, R. B. Cheatham, R. C. Collier, Cline & Bernheim, J. M. Carsey, R. H. Gardner, Henry Hensley, Ed. Kelly, Ed. Kelly, trustee, R. C. McNairy, H. W. Morgan, M. E. Nichol, John Porterfield, Thomas Plater, Sam'l Pritchett, Mrs. M. E. Porterfield, James Simmons, Delia Simmons, H. C. Shapard, R. Thompson, G. P. Thruston, R. F. Woods, J. P. Williams, Ja's Whitworth, A. L. Landis, J. W. Thomas, H. W. Compton, Hugh Douglass, Mrs. N. K. Griffin, N. K. Griffin, Henry Hart, V. L. Kirkman, O. F. Noel, E. T. Noel, L. Warner, W'm Connell, S. Wallace, N. W. Walton, J. Alexander, B. Bender, Sam'l Nickelson, T. W. Nickelson, L. B. Fite, H. C. Ellis, F G. Harris, T. Harris, A. C. Towson, W'm O. Allison, W. P. Ingram, Jno. T. Morgan, C. Morgan, W'm Parks, A. M. Morgan, W. S. Alexander & Co., R. C. Alexander, R. L. Alexander, J. M. Myers, J. H
27 Young, Mrs. N. E. Young, A. R. Hall, M. R. Morgan, Samuel Carpenter, Mary Miller, S. F. Glass, John B. McEwen, Sam'l L. Graham, W. P. House, B. W. McCrae, George Swayden, H. M. Spofford, A. H. Blanchard, Mary A. Baird, Mary A. Baird, ex'x, T. T. Hillman, and G. F. Swayden, and the complainants having complied with the conditions imposed by said fiat, we, therefore, in consideration of the premises aforesaid, do strictly enjoin and command you, the said Mayor and City Council of Nashville, and all and every person before mentioned, under the penalty prescribed by law, of your and every of your goods, lands, and tenements, to be levied to our use, that you, and every one of you, do absolutely desist from attempting in any way to collect from said complainants, or either of them, the tax so assessed as above mentioned until hearing of this cause in our said court of chancery.

28 Witness Nathaniel Baxter, j'r, clerk and master of our said court, at office the first Monday in October, in the year of our Lord

one thousand eight hundred and seventy-one, and in the 96th year of our Independence.

NATHANIEL BAXTER, J'R,
Cl'k & Master.

By J. WALKER,
D'p. Cl'k & Master.

Iss'd Febr'y 13, 1872.

N. BAXTER, J'R,
C. & M.

Came to hand and executed Febr'y 13, 1872, by reading this injunction to K. J. Morris, mayor of the city of Nashville.

C. M. DONALDSON,
Sh'ff.

S'p'a to ans.

STATE OF TENNESSEE:

To the sheriff of Davidson County, greeting:

We command you to summon the mayor and city council of Nashville, if to be found in your county, to appear before the chancellor of the chancery court at Nashville on the first Monday in April next, then and there to answer the bill of complaint of A. G. Adams and others
29 v. The Mayor and City Council of Nashville, and further to do and receive what our said court shall consider in that behalf.

And this you shall in nowise omit, under the penalty prescribed by law. Herein fail not, and have you then and there this writ.

Witness Nathaniel Baxter, j'r, clerk and master of our said chancery court, at office in the court-house at the city of Nashville, this 1st Monday in October, 1871, and in the 96th year of American Independence.

NATHANIEL BAXTER, J'R,
Cl'k & Master.

By J. WALKER,
Dp. Clerk and Master.

Issued March 4, 1872.

N. BAXTER, J'R, *C. & M.*

Pl'ffs' return

Came to hand and executed this process on K. J. Morris, mayor of the city of Nashville, by reading the same and delivering a copy of bill to him this 4th March, 1872.

CHL. LANIER,
Dp. Sh'ff.

In chancery court of Davidson County, April term, 1872.

Decree April term, 1872.

A. G. ADAMS ET AL.
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE. } May 6, 1872.

30 In this cause, on suggestion to the court that the injunction heretofore granted to complainants has been construed to extend

to certain judgments heretofore rendered in supreme court of Tennessee against several of said complainants, it is ordered by the court that said injunction shall not extend to any such judgments, but that if it bear such construction it is hereby so modified as to permit the collection of all such judgments actually rendered.

Demurrer.—Filed May 8, 1872.

In chancery court of Davidson Co., April term, 1872.

A. G. ADAMS ET AL.
v.
MAY. & CITY COUNCIL OF NASHVILLE.

The defendants, the said Mayor and City Council of Nashville, come by attorney and demur to complainants' bill, and for specific cause of demurrer say:

1st. Said bill is not brought against the proper parties. This defendant has the power to appoint an assessor and revenue collector,
31 but neither officer performs his functions under the control or under the direction of this defendant; but the duties of each of said officers and the mode of performing the same are prescribed by the laws enacted by the legislature of State, so that if the said collector shall proceed to collect the taxes mentioned in the bill it is a matter which this defendant cannot control.

Act of March 16, 1868, to amend charter of Nash.

2nd. The bill discloses no such facts and circumstances as entitle complainants to any relief in a court of equity.

3rd. This court has no jurisdiction of the subject-matter of the bill The assessor had jurisdiction to make the assessments, and the above-mentioned provides a tribunal and prescribes the mode of procedure for the correction of errors in such assessment. And if for want of opportunity given or for any other lawful cause there remains a further remedy, it is by certiorari to correct the assessment.

4th. The bill is multifarious. These several parties, if they
32 have any cause of action, have each a separate and distinct cause of complaint. They cannot be joined in one bill.

And for other good causes of demurrer appearing upon the face of the bill and to be shown on the argument.

JOHN LELLYETT,
PLAYER MARTIN,
Sol's.

Decree.—April term, 1872.

A. G. ADAMS ET AL.
v.
THE MAY. & CITYCOUNCIL OF NASHVILLE.

This cause came on to be heard on the 1st day of June, 1872, and on a former day of this term before the Honl. E. H. East, chancellor, &c., on the motion of defendants to dissolve the injunction heretofore granted in this cause, and upon argument of counsel; whereupon it is considered by the court that said injunction be dissolved and that the funds heretofore paid into the court as the condition upon which said injunc-
33 tion was granted be paid over to said defendant, the Mayor and City Council of Nashville, upon said corporation entering into

bonds, with security, approved by the clerk and master, in double the amount of the funds so to be paid over, conditioned for the repayment of the same with interest to the complainants, if so ordered on final hearing.

Decree—April term, 1872.

A. G. ADAMS ET AL'S
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

In this cause, on motion of defendants, by their solicitor, it is ordered that the fund heretofore deposited by complainants, by the clerk and master, be loaned out on good security at 10 per cent. interest, payable on call, and so kept invested until the further orders of this court.

Decree final—August 2nd, 1872.

A. G. ADAMS ET AL'S
v.
THE MAYOR & CITY COUNCIL OF NASHVILLE.

This cause came on to be further heard on the 2nd day of
34 August, 1872, and on a former day of this term, before the honorable chancery court of Davidson County, on the demurrer of defendant to complainants' bill, upon consideration whereof it is ordered, adjudged, and decreed by the court that said demurrer be sustained and that the bill of complaint be dismissed with costs. To said decree complainants except, and thereupon pray an appeal to the next term of the supreme court of errors and appeals of the State of Tennessee, at Nashville, which is granted on giving bond and security according to law.

Appeal bond.

Know all men by these presents that we, the Fourth National Bank of Nashville, principal, and Smith, Baxter, and Allison, securities, are held and firmly bound unto the Mayor and City Council of Nashville, or their certain attorneys, executors, administrators, or assigns, in the penal sum of two hundred and fifty dollars, for the true payment
35 whereof we bind ourselves, our heirs, executors, and administrators firmly by these presents, signed and dated this 2nd day of August, 1872.

The condition of the above obligation is such that, whereas the above-bound Fourth National Bank has prayed for and obtained an appeal from the chancery court at Nashville for Davidson County, to the supreme court of this State, at its next term to be held at Nashville, in the State of Tennessee, from a decree rendered in said chancery court at Nashville, at its April term, 1872, in the case of A. G. Adams and others against The Mayor and City Council of Nashville, now, if the said Fourth Nat'l Bank of Nashville shall well and truly prosecute its said appeal with effect, or, in case it fail therein, pay and satisfy the whole costs which may be awarded against it for wrongfully prosecuting said appeal and satisfy the judgment of said supreme court thereon, then the above obligation to be void; else to remain in
36 full force and effect.

FOURTH NATIONAL BANK OF NASHVILLE,
By SMITH, BAXTER & ALLISON, *Att'ys.*
SMITH, BAXTER, AND ALLISON,
Securities.

Filed August 2nd, 1872.

STATE OF TENNESSEE,
Davidson County:

I, Nathaniel Baxter, j'r, clerk and master of the chancery court at Nashville, do hereby certify that the foregoing is a full, true, and perfect transcript of all the records, papers, and proceedings had and on file in the cause wherein A. G. Adams and others are complainants and The Mayor and City Council of Nashville are defendants, as the same appears of record and now on file in my office.

In testimony whereof I hereunto set my hand and affix the official seal of said court, at office in the court-house at Nashville, this the
37 31st day of October, 1872, and the 97th year of American Independence.

[SEAL.] NATHANIEL BAXTER, J'R,
Clerk & Master,
By JAS. WALKER, *D. C. & M.*

Caption of supreme court of Tennessee.

STATE OF TENNESSEE:

Be it remembered that at a supreme court began and held at the capitol, in the city of Nashville, on the first Monday in January, A. D. 1874, it being the 5th day of said month, for the 5th, 6th, 7th, 8th, 9th, 10th, and parts of the 11th and 16th judicial circuits, present, the Honls. A. O. P. Nicholson, chief-justice, and Associate Justices James W. Deaderick, Jno. L. T. Sneed, Thomas J. Freeman, Peter Turney, and Robert McFarland, when the following proceedings were had, to wit:

SATURDAY, *March* 14, 1874.

Court met pursuant to adjournment. Present, the Honls. A. O. P. Nicholson, chief-justice, and Associate Justices James W. Deaderick, John L. T. Sneed, Thomas J. Freeman, and Robert McFarland, when the following proceedings were had, to wit:

38 ADAM G. ADAMS ET AL'S
v.
THE MAYOR AND CITY COUNCIL OF NASHVILLE. } No. Davidson Eq. D'k't.

This cause came on to be heard by the supreme court of Tennessee, on the 13th day of March, 1874, and on former days of this term, on the transcript of the record from the chancery court at Nashville, and upon argument of counsel. Upon consideration whereof the court is of opinion, and doth so adjudge and decree, that the taxation complained of, as shown by the case made out in the bill of complaint, is in pursuance of the laws of Tennessee. That the laws of Tennessee referred to and complained of in the bill and the ordinances of the corporation complained are not repugnant to or in conflict with the constitution or the provisions or limitations of any statute of this State or of the United States, and specially not in conflict with any of the limitations,
39 conditions, or restrictions of the national banking laws, and being of opinion that the exemption of State, county, and corporation bonds by the act of the general assembly of the State of Tennessee, passed March 1st, 1869, was repealed by subsequent legislation so as not to be operative upon the taxes levied for the years 1870 and 1871, and thereafter; and that the attempt of the city corporation by its ordinance to exempt its own bonds from taxation cannot operate to

disturb the equality of the assessment of all property for taxation according to its value, as provided by the constitution and laws of this State.

The court doth therefore order, adjudge, and decree that the decree below dismissing complainants' bill be affirmed, the original injunction dissolved, and the fund paid into the court below in lieu of security for injunction, together with interest accrued on loans of the same, be paid to the defendant, a lien on said fund being claimed by and allowed
40 to John Lellyett, the solicitor for defendant, for his fee in said cause, and that the cost of this cause in this court and the court below be paid by the complainants and their surety, for which execution may issue.

41 *Surety on bail in error.*

Know all men by these presents that we, Tho's D. Fite and R. G. Throne, are held and firmly bound unto The Mayor & City Council of Nashville, Tennessee, in the full and just sum of five thousand dollars, to be paid to the said Mayor & City Council of Nashville, Tennessee's, certain attorney, successors, or assignees, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 14th day of March, eighteen hundred and seventy-four.

Whereas lately at a term of the supreme court of Tennessee, at Nashville, in a suit pending in said court between A. G. Adams & others, complainants, against The Mayor & City Council of Nashville, Tennessee, defendants, a decree was rendered against the said complainants, and the said complainants having obtained a writ of error and
42 filed a copy thereof in the clerk's office of said *suit*, to reverse the decree in the aforesaid suit, and a citation directed to the said mayor and city council of Nashville, Tennessee, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the 2d Monday of October next:

Now, the condition of the above obligation is such that if the said A. G. Adams and others, complainants, shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THO'S D. FITE. [SEAL.]
R. G. THRONE. [SEAL.]

Sealed & delivered in presence of and approved by—
A. O. P. NICHOLSON,
Chief-Justice of Tennessee.

43 *Copy of opinion.*

A. G. ADAMS & CO.
v.
MAYOR & CITY COUNCIL OF NASHVILLE.

Passing the questions made by demurrer as to parties or the remedy, we hold that the complainants are entitled to no relief; that the taxation complained of is not in conflict with the national banking law.

1st. The exemption of State, county, and corporation bonds by the act of March 1st, 1869, is repealed by the acts of 25th February, 1870,

and June 29th, 1870. (See Thompson's and Steger's Statutes, 541 & 542; see also Constitution of 1870, art. 2, sec. 28.)

2nd. The corporation probably had no authority to exempt its bonds from taxation. The taxes are to be assessed under the acts of the legislature; but, if it did, this does not affect the present tax.

As to the point that the 3rd section of the act of 23rd January, 1871, (act' of 1870-'1, chapter 50,) has been violated, we hold that this
44 section refers to taxes imposed to meet bonds issued by the county, city, or town, as provided for in the 2nd section of the act. It says taxes imposed by this act "voted for by any county, city, or town shall not be greater than the State taxes on property and polls." The act has been repealed. We refer to and adopt the opinion, &c., at a former term, in the case of McLaughlin v. Chadwell, tax-collector, as showing the reasons more fully upon which our judgment rests in the present case. The decree of the chancellor sustaining the demurrer will be affirmed, with costs.

McFARLAND, *J.*

I, F. C. Dunnington, clerk of the supreme court of Tennessee, at Nashville, hereby certify that the foregoing contains a full, true, and perfect copy of the transcript of the record filed in said court from the chancery court at Nashville, Tennessee; also of the decree and opinion of said supreme court in the case of A. G. Adams et als.,
45 stockholders in the Fourth National Bank of Nashville, v. The Mayor and City Council of Nashville, and of the security or bail in error, as the same appears from the original now on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in the capitol in the city of Nashville, this twenty-fourth day of June, A. D. one thousand eight hundred and seventy-four, and in the ninety-eighth year of American Independence.

[SEAL.] F. C. DUNNINGTON, *Clk.*

(Indorsement on cover:) No. 46. A. G. Adams & Co., H. B. Buckner, trustee, J. Bloomstein, et al., plaintiffs in error, *vs.* The Mayor and City Council of Nashville, Tennessee. Tennessee sup. court. Filed 29th January, 1875.

In the Supreme Court of the United States.

No. .....

A. G. ADAMS ET AL.,

PLAINTIFFS IN ERROR,

VS.

MAYOR AND CITY COUNCIL OF NASHVILLE

DEFENDANT IN ERROR.

ED. BAXTER,
Solicitor for Plaintiffs in Error.

A. G. ADAMS ET AL.,

PLAINTIFFS IN ERROR,

vs.

The Mayor and City Council of Nashville,

DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error, who are stockholders in the Fourth National Bank of Nashville, Tennessee, filed their bill in the Chancery Court of that State against the defendant in error, a municipal corporation, to enjoin the collection of a tax imposed upon their shares of stock by said corporation, and to have the tax declared illegal and void.

The bill was demurred to. The Chancellor sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court of Tennessee—the highest court of law or equity in the State—the decree of the Chancellor was affirmed, and thereupon the case was brought to this Court by writ of error under the 25th section of the Judiciary Act.

As several of the questions which were made by the bill were not federal in their character, and the decision of the State Court is conclusive against us upon them, we will only refer here to such questions presented by the record as we think are properly re-examinable by this Court.

We concede the abstract right of the State and its municipal corporations to tax the shares of National Banks, notwithstanding their entire capital may be invested in United States bonds; and the only objections which we make to the tax in question grow out of the supposed conflict of State and Municipal legislation and action with the provisions of the Act of Congress on the subject. We also concede that now the power of State taxation over the shares of National Banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed *upon other moneyed capital in the hands of individual citizens of the State.*[1] It will thus be seen that we do not propose to re-open or re-argue any of the questions that have been decided by this Court upon the subject.

On the 1st of March, 1869, the Legislature of Tennessee passed an act, the only provision of which that we complain of, and therefore the only one that we need here insert, is as follows:

"That no tax shall hereafter be assessed upon the *capital* of any bank, or banking association, or any joint-stock company organized under the authority of this State or of the United States."[2]

On the 18th of April, 1870, the Corporation of Nashville, in contemplation of the issuance of $500,000 of its bonds, passed an ordinance, the second section of which is as follows:

"That said bonds shall be exempt from taxation by this Corporation—this provision being intended as a stipulation in the contract; and said bonds and their coupons, as either mature, shall be receivable by this Corporation for taxes."[3] It is alleged in the bill, and admitted by the demurrer, "that said ordinance was copied upon the back of said bonds, and referred to in their face, and that many thousands of dollars of the moneyed capital of private individuals in said Corporation have been, and are now, invested in said bonds, and thus exempted from all municipal taxes.

---

1 15 U. S. Stat., p. 34.

2 Statutes of Tenn., by Shankland, p. 20, s. 9.

3 Laws of Nashville, edition of 1872, by Lellyett, p. 257.

On the 1st day of March, 1867, the Corporation passed an ordinance, which is as follows:

"That hereafter all persons doing a mercantile business of any kind within the City of Nashville shall obtain license from the Recorder before or at the time of beginning such business, paying the fees heretofore charged; and in lieu of the per-centum tax heretofore charged, shall pay in advance *one per centum on the capital invested in such business* during the ensuing year to be used in the purchase of goods, or in making advances on goods or produce, or for any other purpose whatever connected with such business: Provided, that no wholesale merchant, or storage, receiving or forwarding merchant, or commission merchant, shall pay a less sum than one hundred dollars, and no retail merchant a less sum than five dollars."[1]

The bill avers that this ordinance is still in force, and that by virtue of it, all the capital invested in the mercantile business in said city is exempted from all corporation taxes over one per cent.; while plaintiffs' shares of stock are taxed at the rate of two per cent. upon their value.

The State of Tennessee levies a tax on plaintiffs' shares, amounting in the aggregate to three thousand dollars per year; the County of Davidson levies an additional tax of about five thousand dollars per year: and the defendant's Corporation, still another tax amounting to about ten thousand dollars per year. It will thus be seen that if the tax is legally imposed, it will amount in the course of the twenty years for which the bank is chartered to nearly half a million of dollars.

---

[1] Digest City Ordinances, 1868, pp. 147, 148.

A. G. ADAMS ET AL.

VS.

THE MAYOR AND CITY COUNCIL

OF NASHVILLE, TENNESSEE.

STATEMENT OF ERRORS.

The plaintiffs in error insist that the Supreme Court of Tennessee, in the decree rendered in this case, erred upon the following points:

1st. In deciding that the act of the Legislature of the State of Tennessee passed March 1st, 1869, which provides "that no tax shall hereafter be assessed upon the capital of any bank, or banking association, or any other joint-stock company organized under the authority of this State or of the United States," is not repugnant to, nor in conflict with, the provisions or limitations of any statute of the United States, and especially not in conflict with any of the limitations or restrictions of the National Banking Laws.

2d. In deciding that an ordinance of defendant's Corporation, passed on the 18th of April, 1870, providing that five hundred thousand dollars of bonds, then about to be issued by said Corporation for sale, should be exempt from taxation by said Corporation—said provision being intended as a

stipulation in the contract, being copied on the back and referred to in the face of said bonds—is not repugnant to nor in conflict with the provisions or limitations of any statute of the United States, and especially not in conflict with any of the limitations of the National Banking Laws.

3d. In deciding that another ordinance passed by defendant's Corporation March 1st, 1867, providing that only one per cent. shall be assessed for taxes on the capital invested in the mercantile business in said city, while plaintiffs' National Bank shares are assessed two per cent. upon their value, is not repugnant to nor in conflict with the provisions or limitations of any statute of the United States, and especially not in conflict with any of the limitations of the National Banking Laws.

ARGUMENT.

I. The act of Congress requires that the shares of National Banks shall not be taxed by a State "at a greater rate than is assessed upon other moneyed capital *in the hands of individual citizens of such State.*"[1] The act of the Legislature of Tennessee passed March 1st, 1869, provides that no tax shall "be assessed upon the *capital* of any bank, or banking association, or any joint-stock company organized under the authority of"[2] said State. We insist that said capital *is capital in the hands of the individual members or stockholders who own and manage the property of said corporations;* and that as it has been exempted from taxation by the State, our National Bank shares must also be exempted, or they will be taxed at a greater rate than it is taxed.

It will be argued on the other side that the capital exempted by the State belongs to the banks, banking associations, and joint-stock companies; that it is therefore capital in the hands of corporations and not of the individual citizens of said State, and for this reason does not fall within the letter of the act of Congress.

This raises the question as to who is the real owner of property, the naked legal title to which is vested in a corporation.

As remarked by Mr. Justice Nelson, this Court announced but a familiar principal of law, when it held that "the corporation is the *legal* owner of all the property of the bank, both real and per-

---

[1] 15 U. S. Stat., p. 34.

[2] Statutes of Tenn., by Shankland, p. 20, s. 9.

sonal;[1] and that its capital, in whatever it may be invested, is owned by the bank as a *corporate entity*, and not by the stockholders."[2]

Conceding, as we do, that the bank, as a mere "corporate entity," holds the naked "legal" title to its capital, yet, as decided by the Supreme Court of Tennessee, this legal right is vested in the corporation "to be used and managed in trust *for the benefit of the members;*[3] and, as decided by this Court, while "the directors are the trustees or managing partners," yet *the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation.*[4]

In another case this Court say that "corporations of this kind are in truth little more than private partnerships," and that "the tendency of the discussions and judgments of the Court of Chancery in Great Britain and of the courts of this country is to concede the existence of a *distinct and positive right of property in the individuals composing the corporation, in its capital* and business, which is subject in the main to the management of the corporation itself."[5] So the Supreme Court of Ohio say that "the *stockholders own the whole fund* managed by the directors as their agents and trustees;"[6] and the Chancellor of New Jersey, speaking of stockholders in a railroad corporation, states the principle thus: "As stockholders, *they own the road in common, each owns a share in the whole,* and is to have a proportionate share in its profits. *They have a right in the road* and in every dollar it earns. The directors are *their* trustees to employ the *joint capital* in the management of the road."[7] In other words, the entire property or capital of the corporation is in equity, and

---

[1] Van Allen *vs.* The Assessors, 3 Wall., 584.
[2] National Bank *vs.* Commonwealth, 9 Wall., 359.
[3] Union Bank *vs.* The State, 9 Yerg., 498.
[4] Koehler *vs.* Black River Falls Iron Co., 2 Black., 721; 3 Paige, 232.
[5] Bacon *vs.* Robertson, 18 Howard, 485, 486.
[6] Taylor *vs.* Miami & Co., 5 Ohio, p. (167.)
[7] Kean *vs.* Johnson, 1 Stockt., 407.

ARGUMENT.

I. The act of Congress requires that the shares of National Banks shall not be taxed by a State "at a greater rate than is assessed upon other moneyed capital *in the hands of individual citizens of such State.*"[1] The act of the Legislature of Tennessee passed March 1st, 1869, provides that no tax shall "be assessed upon the *capital* of any bank, or banking association, or any joint-stock company organized under the authority of"[2] said State. We insist that said capital *is capital in the hands of the individual members or stockholders who own and manage the property of said corporations;* and that as it has been exempted from taxation by the State, our National Bank shares must also be exempted, or they will be taxed at a greater rate than it is taxed.

It will be argued on the other side that the capital exempted by the State belongs to the banks, banking associations, and joint-stock companies; that it is therefore capital in the hands of corporations and not of the individual citizens of said State, and for this reason does not fall within the letter of the act of Congress.

This raises the question as to who is the real owner of property, the naked legal title to which is vested in a corporation.

As remarked by Mr. Justice Nelson, this Court announced but a familiar principal of law, when it held that "the corporation is the *legal* owner of all the property of the bank, both real and per-

---

[1] 15 U. S. Stat., p. 34.

[2] Statutes of Tenn., by Shankland, p. 20, s. 9.

sonal;[1] and that its capital, in whatever it may be invested, is owned by the bank as a *corporate entity*, and not by the stockholders."[2]

Conceding, as we do, that the bank, as a mere "corporate entity," holds the naked "legal" title to its capital, yet, as decided by the Supreme Court of Tennessee, this legal right is vested in the corporation "to be used and managed in trust *for the benefit of the members;*[3] and, as decided by this Court, while "the directors are the trustees or managing partners," yet *the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation.*[4]

In another case this Court say that "corporations of this kind are in truth little more than private partnerships," and that "the tendency of the discussions and judgments of the Court of Chancery in Great Britain and of the courts of this country is to concede the existence of a *distinct and positive right of property in the individuals composing the corporation, in its capital* and business, which is subject in the main to the management of the corporation itself."[5] So the Supreme Court of Ohio say that "the *stockholders own the whole fund* managed by the directors as their agents and trustees;"[6] and the Chancellor of New Jersey, speaking of stockholders in a railroad corporation, states the principle thus: "As stockholders, *they own the road in common, each owns a share in the whole,* and is to have a proportionate share in its profits. *They have a right in the road* and in every dollar it earns. The directors are *their* trustees to employ the *joint capital* in the management of the road."[7] In other words, the entire property or capital of the corporation is in equity, and

---

[1] Van Allen *vs.* The Assessors, 3 Wall., 584.
[2] National Bank *vs.* Commonwealth, 9 Wall., 359.
[3] Union Bank *vs.* The State, 9 Yerg., 498.
[4] Koehler *vs.* Black River Falls Iron Co., 2 Black., 721; 3 Paige, 232.
[5] Bacon *vs.* Robertson, 18 Howard, 485, 486.
[6] Taylor *vs.* Miami & Co., 5 Ohio, p. (167.)
[7] Kean *vs.* Johnson, 1 Stockt., 407.

reality owned jointly by the stockholders, though, for convenience, the naked legal title is technically said to be vested in the "corporate entity;" and not only do the stockholders own all the property of a corporation, but they have the ultimate and supreme control of that property. Without their acceptance of the charter it cannot be called into existence; unless they furnish the means, it cannot be put into practical operation. In every sense of the word it is *their* corporation, and the property and capital standing in its name is *theirs*. Under such circumstances, it would be strange indeed if they were not allowed to control and manage its property and affairs. Mr. Walker, in his American Law, says: "The *management* of the affairs of a corporation pursuant to the provisions of the charter must depend upon the votes of the *members;*" though "in business corporations the representative principal is usually adopted, and the immediate supervision is committed to a board of directors elected by the stockholders together with other appropriate officers." [1]

We have it, then, that in reality the stockholders are the owners of the capital of the corporation, and through the directors and officers (as their agents and trustees) they manage and control that capital. Then how can it be said that it is not capital in their hands? We say it is as much so as any capital in the hands of an individual of which he is the real, though only the equitable, owner.

We will also reach the same result by recurring to the elementary definition of a corporation. Chancellor Kent says: "A corporation is a franchise possessed by one or more individuals," and its object is "to enable the members to act by one united will and to *continue their joint powers and property* in the same body undisturbed by the change of members," etc.[2]

Here is a clear recognition that stockholders, though they may

[1] Walker's Am. Law, p. (221), 5th ed.
[2] 2 Kent's Com., p. 268, 12th ed.

contribute their money to the capital of a corporation, still continue their joint powers and property in it. In fact it is expressly said that they own the corporation itself.

Mr. Walker says that corporations consist of natural persons clothed by law with an artificial character and capacity; and he adds that when two or more persons desire to unite their means for the purpose of carrying on some enterprize which neither might be able to accomplish by himself, there are but two legal ways of doing it conveniently. They must either be constituted a corporation by means of a legislative charter, or they must enter into a partnership by virtue of a contract; and though differing in many other respects, "corporations and partnerships both agree in being relations voluntarily assumed by the members, and also in having for their object the association of several individuals for the purpose of co-operation in business."[1] Here we see that a corporation consists of its stockholders in nearly the same sense that a partnership is said to consist of its members; and while the bankrupt system and other laws clearly recognize a distinction between the firm property of the partnership and the separate property of the partners, yet no one will argue that the firm capital is not capital in the hands of the individuals who compose the firm, though technically it may be called the property of the firm.

This Court, in discussing the liability of corporations created by the States, to be sued in the Federal Courts, use this language: "A corporation aggregate is but an artificial *body of men* bound together by the mere corporate name. Citizens cannot exempt themselves from being sued in the Federal Courts by citizens of another State by the fact that the subject of controversy has arisen upon a contract to which they (the citizens) are parties in their corporate and not in their personal character."[2] "The important faculty of being a corporation conferred upon individual

[1] Walker's Am. Law, p. 216, 5th ed.

[2] Louisville Railroad Co. *vs.* Letson, 2 How., (552) (553)

citizens by State legislation for their own convenience cannot be wielded to deprive others of their acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."[1] We submit that this language of the Court is peculiarly appropriate to the position assumed against us—the stockholders being the real owners of the corporate capital, and having the actual management of it through their agents and officers; to exempt that capital upon the technical ground that they own it "in their corporate and not in their personal character," seems to us a "syllogism or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."

As, however, our opponents will insist upon a most literal construction of the act of Congress, it may be well to inquire how it can be said with any regard to that mode of construction that capital is "*in the hands*" of a corporation which is said by Chief Justice Marshall to be a mere "artificial being, invisible, intangible, and existing only in contemplation of law"? It may also be well to notice that the act of Congress draws no distinction between individual citizens acting in their "corporate character" and those acting in their "personal character;" and therefore capital which they have in their hands in the one character is as much liable to taxation as that which they have in the other.

We see, then, that whether we adopt a literal or a fair construction of the act of Congress, the result is the same.

If the moneyed capital invested by individuals in a joint-stock company or in a partnership, though used as the capital of the joint concern, must be taxed by the State, how can those same individuals procure its exemption by merely obtaining a charter of incorporation, which may always be had for the asking?

---

[1] Marshall *vs.* B. & O. R. R. Co., 16 How., (327) (328).

If such capital is to be said to be in the hands of the corporation, and by that quibble be exempted from taxation, what would prevent all the individuals in the State from transferring their moneyed capital in trust to the corporations of the State, and by that device avoid all State taxes whatever, and throw the entire burden of the government upon shareholders of National Banks?

And if no capital is to be regarded as within the purview of the act of Congress except such as is literally and physically in the hands of the individuals who really own it, why may not the State now exempt from taxation the moneyed capital of all the minors, lunatics and others, who occupy the relation of *cestuis que trust?*

But it will be said that the capital of National Banks is exempted from taxation by the State as well as the capital of State Banks, and therefore that we should not complain. It is in this very act of apparent fairness that the real evasion is sought to be concealed. The State well knew that, under the National Banking Acts, we are compelled to invest as much as one-third of our capital in United States bonds, and that in fact the whole of it was so invested. The State knew that these bonds were already exempted from taxation by an authority superior to her, and that in her proposal to exempt them, she sustained no loss and we acquired no benefit. The offer was as barren as it was deceptive. On the other hand, she knew that her own banks, banking associations, and other joint stock companies, were not bound to invest a dollar of their capital in United States bonds, and that as a fact it was all invested in other and more profitable securities, which were, however, not exempt from taxation; but in order to place her own institutions upon as good a footing as if their capital was, like ours, invested in Government bonds, she seeks, by offering to exempt our capital, which is already exempt, to procure a similar exemption for their capital, which she had no right to exempt.

It is a well-known fact that Congress, in creating National

Banks, not only had in view the establishment of a sound paper currency for the people, but also to provide safe depositories for the public funds, and, what was still more important, to create a home market for the Government bonds, and thus sustain its credit at the most perilous moment of the nation's life; and for this reason the privilege of banking was offered to the citizens, coupled with the condition that at least one-third of the banks' capital shall be invested in such bonds. It is also well known that a bank cannot make as high a rate of profit on capital invested in Government bonds as it can by many other investments known to commerce, and it is also known that in purchasing such bonds regard is had to their exemption from taxation, and that the Government receives the full value of the exemption in the increased price which it gets for such bonds. Now, Congress did not intend to act with bad faith towards the National Banks, and it did not intend that the States should nullify the exemption by giving all other capital the same benefit; therefore it required that the States should tax all the moneyed capital of their citizens at as high a rate as they assessed upon the National Bank shares. Tennessee has replied to this demand of Congress that she *will* tax all the capital held by her citizens in their *personal* capacity; but that she will *not* tax the capital held by them in their *corporate* capacity; and that she intends to put the latter upon the same footing as the United States bonds in which our capital is invested. We insist that Congress did not intend to allow this to be done, and that it is not fair that it should be done. Congress had the right to exempt the Government bonds from State taxation. We paid the fair value of this exemption in the increased price we gave for the bonds over what we would have given had they not been exempt; and as an equivalent for this, we have a moral as well as a legal right to insist that the State Banks, with whom we are brought in competition, shall pay a tax on the capital employed by them in their business.

If any of their capital is invested in Government bonds, we

are willing that it shall have the same exemption as ours; and so, if any of our capital is invested otherwise than in Government bonds, we are willing to be taxed upon it at the same rate we demand shall be imposed upon theirs. Whatever is taxable should be taxed, whether held by State or National Banks, and whatever is exempt should be exempted, whether held by the one or the other; but where either has paid in advance for the exemption of its capital, the other should not be allowed the same advantage without paying for it at the same rate.

It will be argued that if this Court should hold that the capital of a bank is (within the meaning of the act of Congress) capital in the hands of the individual stockholders who own and control it, and therefore liable to taxation, then, inasmuch as the stockholders in the State Banks are taxed by the State on their shares, it would be double taxation if they were taxed again for the capital of the bank.

To this we might reply that we were compelled to pay in advance for the exemption of our capital from taxes in the increased price we were forced to pay for the Government bonds in which it is invested, and yet that we are also taxed upon our shares of stock by the State.

But in Van Allen *vs.* The Assessors,[1] it was decided that such was *not* double taxation. In that case it was held that the shares of stockholders in a National Bank could be taxed by the State, though all the capital of the bank was invested in exempted Government bonds. Now, if the *shares* of the stockholders had embraced the interest which the stockholders had in the capital of the bank, the shares could not have been taxed at all, as it would have been a tax laid directly upon the Government bonds. It was therefore necessary to hold that a tax upon the *shares* of stockholders in a bank was *not* a tax on *their interest in the capital of the bank,* and consequently the State can tax both without its amounting to double taxation.

---

[1] 3 Wall., 573.

The shares of stock owned by a stockholder are "a distinct independent interest or property held by him like any other property that may belong to him;"[1] a property that he owns in his "*personal* character" *separate* from his associate stockholders as well as from the corporation, and to which he has both the legal and equitable title. But as we have before shown the interest which stockholders have in the capital of the corporation is a *joint* interest as between themselves; an interest which they own in their "*corporate* character," and to which they have only an *equitable* title—the naked legal title, as above stated, standing in the name of their "corporate entity," and their management of it being exercised through their agents and officers.

We also know as a fact that the shares of stock in a corporation have a separate value of their own in the market, depending almost entirely upon the character of the dividends which they are known to pay—neither the stockbroker nor the tax assessor ever in fact look beyond the dividends declared and the market quotations to arrive at its value. In the case of Van Allen *vs.* The Assessors, it was argued that the State assessor must institute an inquiry into the investment of the capital of the bank and ascertain what portion was invested in United States bonds exempted from taxation, and make a proper discrimination in the assessment of the shares; but this Court held that such was no part of his duty.[2] If, then, the assessor has no right, in assessing the shares of stock, to look into the investment of the capital of the bank to see whether it is exempt or non-exempt, nor whether it has been increased by good management or wasted by bad management; in a word, if he cannot look into the character or condition of the capital for any purpose, it is impossible for him to embrace the stockholders' interest in the capital in the assessment which he makes upon their shares. In fact the Court say in so many words that a tax on the shares of stock is not a tax on the capital of the bank.[3]

---

[1] Van Allen *vs.* The Assessors, 3 Wall., 584.
[2] 3 Wall., 588. [3] 3 Wall. 583, 584.

It may be said, however, that the case of The People *vs.* The Commissioners,[1] decided by this Court, is an authority against us; but an examination of the precise questions passed upon in that case will show that it is not.

The first point decided was that the shares in banks, whether State or National, were liable to State taxation without regard to the fact that the capital of such banks was invested in the exempted bonds of the United States. In our case we make no such point, but concede that our shares are liable to be taxed by the State, notwithstanding all the capital of our bank is invested in such bonds.

Second: In that case it appeared that the Insurance Companies incorporated under the laws of New York *were* subject to taxation *on their capital*, and that the State assessors in taxing their *capital* deducted from their assessment such United States bonds as formed part of said capital. It further appeared that the said assessors made similar deductions in assessing the individual citizens of New York upon their moneyed capital; and it was insisted for the plaintiffs in error that this discriminated against the shareholders of National Banks and in favor of Insurance Companies and individuals, by refusing to make to the former the same allowance as was made to the latter on account of investments in United States bonds, whereby the former were assessed at a greater rate than the latter upon the moneyed capital in their hands. This Court decided, however, that the meaning of Congress was that National Bank shares should not be taxed at a greater rate than was imposed by the State upon such of the moneyed capital of the individual citizen as was subject or liable to taxation; that it was not intended to drive the States to the absurdity of imposing a tax upon that part of such capital as was invested in bonds which were exempted from taxation, and therefore that the assessors did right in assessing the *capital* of Insur-

[1] 4 Wall., 244.

ance Companies as well as of individuals to deduct therefrom such securities as were exempt from taxation.

That these were the only two points decided by the Court is evident, both from the opinion of the Court and the syllabus of the learned reporter.

In that case the entire capital of the Insurance Companies liable to be taxed was taxed by the laws of New York. In this case none of the capital of the State Banks, banking associations, etc., is taxed by the State of Tennessee.

In that case it was contended that in assessing the capital of the Insurance Companies, the exempted United States bonds held as part of that capital should be taxed. In this case we concede that such part of the capital of the State Banks, etc., as is invested in United States bonds cannot be taxed, and we only insist that such part of it as is not so invested shall be taxed. In other words we are insisting in this case that the capital of State Banks shall be taxed on precisely the same principle that the capital of Insurance Companies was taxed by the State in that case.

The position assumed in this case was not argued in that cas , nor passed upon by the Court; and the facts of the two cases are so directly opposite, that a decision could scarcely be made in one that would be binding authority in the other.

It is true that Mr. Justice Nelson does say in the course of his opinion that the act of Congress does not refer to the rate of assessment upon *Insurance* Companies as a test by which to prevent a discrimination against National Bank shares, and that it is confined to the rate of assessment upon moneyed capital in the hands of individuals; that *Insurance* Companies were not within the words or contemplation of Congress, and that there was not much danger to be apprehended of a discrimination in their favor prejudicial to the rights of individual citizens.[1] We have already conceded that the test is to be confined "to the rate of assesment upon moneyed capital in the hands of individuals;" but we say

[1] 4 Wall., 257, 258.

that the capital of the State Banks is capital belonging to and in the hands of the individuals who are the stockholders thereof; and if so, it is immaterial, under the act of Congress, whether they own it in their corporate or personal character.

And while it may be true that *Insurance* Companies were not within the words or contemplation of Congress, and were not apt to be favorites with the State Legislature as against the citizens of the State, yet it is evident that State Banks and banking associations were within the contemplation of Congress, and while even they as corporations might not be favorites with the State Legislature as against the individual citizens of the State, yet their stockholders would be favorites as against the stockholders of National Banks; and no better evidence of it could be afforded than the attempt on the part of the State of Tennessee to give the shareholders in her State Banks the same benefit of exemption on the capital of their banks as if it was, like ours, invested in bonds of the United States.

II. We insist that our bank shares are taxed by the Corporation of Nashville at a greater rate than the moneyed capital which her individual citizens have invested in the five hundred thousand dollars of bonds issued by said Corporation, which bonds are exempted from municipal taxation by special ordinance of the city, passed April 18th, 1870.

It is admitted by the demurrer that said ordinance was copied upon the back of said bonds, and was referred to in their face; and, as stated in the ordinance itself, was intended as a stipulation in the contract.

But it is now argued for the Corporation that it had no power to pass such an ordinance; that it had no right to agree that said bonds should be exempted, and therefore the exemption being void, the bonds are in fact liable to taxation by the Corporation.

Will the Corporation be heard to make this defense after having sold its bonds to those whom it knew were buying on the

faith of the exemption? In a case where a corporation raised the question of *its power under its charter* to guaranty the bonds of another corporation, which bonds had passed into the hands of *bona fide* holders who relied on the validity of the guaranty, this Court said that "a corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced";[1] and the Supreme Court of Tennessee quote and apply the same language to a municipal corporation of that State.[2] So, this Court held that when the authorities of a city or town had treated a place as a public street, taking charge of it and regulating it as they did other streets, they could not, when sued for an injury caused by their negligence in regard to it, defend themselves by alleging *want of authority* in establishing the street.[3] After the city has received the value of the exemption in the increased price of its bonds, it would be grossly unjust to allow her to insist that she had no right to make it. We submit, however, that the corporation had the power to exempt said bonds from taxation.

It is well settled that a *State* may pass laws exempting property from taxation, which shall operate as contracts, and as such be irrepealable.[4] It is also well settled that the Legislature may delegate to municipal corporations the power of local taxation;[5] and as the power to exempt from taxation necessarily arises from the power to tax, it follows that such a corporation has the same power to exempt property from its taxes that the State would have were it acting directly instead of through the corporation as its delegated agent.

---

[1] Zabriskie *vs.* C. C. & C. R. R., 23 How., 381.
[2] Adams *vs.* M. & L. R. R., 2 Cold., 662.
[3] Mayor *vs.* Sheffield, 4 Wall., 189.
[4] Sedgw. Stat. and Con. Law, p. 628 and 629. Cooley Con. Lim., p. 127.
[5] Cooley Con. Lim., p. 191.

But it is said that the amended charter of the city, passed in 1868, requires "that all property and estate, real, personal or mixed, situated or belonging in said city, which is subject to State taxes shall be assessed and listed for taxation," etc., and that this expressly deprives the corporation of the power to exempt its bonds from taxes. The bonds were not in existence when that charter was passed, and therefore not embraced by it. They were not issued until two years afterwards, and then the exemption was made a stipulation in the contract.

It might well be doubted whether the clause in the charter was intended by the Legislature to do more than give the *power* to tax all kinds of property; but even in those States where provisions are inserted in their constitutions to insure uniformity, and where they are so worded as clearly to forbid gratuitous exemptions, yet the Courts "recognize the power in the Legislature to commute for a tax *or to contract for its release for a consideration.*[1] Such a provision is found in art II., sec. 28, of the Constitution of Tennessee, adopted in 1870, ordaining that "all property, real, personal or mixed, shall be taxed;" and to the same effect was the same article and section in the Constitution of 1834, to wit: that "all property shall be taxed according to its value," etc.;[2] yet our statute books since 1834 are full of charters exempting the property of corporations from taxation, and the validity of such exemptions has always been recognized by our Supreme Court.[3]

But it will be argued that if the exemption is valid, and by virtue of it the city has disabled herself from taxing the capital invested in said bonds, this of itself is a sufficient reason why she should not be required to tax them as a condition precedent to her right to tax our shares. In other words, that Congress does not require of her an impossibility.

---

[1] Cooley Con. Lim., p. 517.

[2] Statutes of Tennessee, by Shankland, pp. lvii., lviii., and note *a*.

[3] Union Bank *vs.* The State, 9 Yerg., 490, cited and approved in 1 Sneed, p. 119; 1 Heisk, 284.

This Court did decide, in Lionberger *vs.* Rouse,[1] that where a State had, by contract entered into *long prior to the passage of the National Banking Act*, disabled herself from taxing two of her banks beyond a certain amount, it was not a bar to her right to collect a tax on National Bank shares for a greater amount. But this case is entirely different. The act of Congress regulating the right to tax such shares was passed June 3, 1864; and with full knowledge of its provisions, the Corporation of Nashville, by contract made in 1870, voluntarily disabled herself from taxing the capital invested in her bonds. There is no countenance in the decision of this Court for the assumption that a State or corporation may first evade the act of Congress by entering into a disabling contract, and then plead such contract as a justification of the evasion. The city had the right, as a financial question, to decide which was most to her interest—to get an increased price for her bonds, by exempting them from taxation, or to forego this advantage and tax the National Bank shares within her jurisdiction. She had the right to do either, but she could not do both; and having made her election, she must abide by it.

Suppose, however, that contrary to our views, this Court should hold that the Corporation had no right to make the exemption which it assumed to make, and therefore that the capital invested in said bonds is in fact legally liable to taxation, and should be taxed by the city like all other property; then we have a case where hundreds of thousands of dollars of the moneyed capital of her individual citizens which is legally liable to taxation, and which it is the duty of the city to tax, is omitted from her assessment, not by a mere oversight, but in obedience to her own ordinance deliberately made for that purpose.

The question, whether other capital is legally or illegally exempted from the State or corporate assessment, is immaterial; the test imposed by Congress is that our shares shall not be taxed

---

[1] 9 Wall., 468.

"at a greater rate than is (*as a matter of fact*) assessed upon other moneyed capital," etc.

In the case of Gilman *vs.* City of Sheboygan[1] a special tax was levied upon the real estate in the city, but the personal property of the value of $300,000 or $400,000 was exempted from the tax. This Court decided that, under the Constitution of Wisconsin, the Legislature had no power to make this discrimination in favor of the personal property, and that its attempted exemption was illegal and void; and upon the very ground that the exemption of the personal estate was illegal, they held that the tax levied upon the real estate was "utterly void." So Mr. Cooley says, that "wherever a tax is invalid because of excess of authority, or because the requisites in tax proceedings which the law has provided for the protection of the taxpayers are not complied with, any sale of property based upon it will be void also."[2] Those "safeguards which the Legislature has thrown around the estates of citizens to protect them against unequal, unjust and extortionate taxation, the Courts are not at liberty to do away with by declaring them non-essential."[3] But in this case the city asks that we be made to pay our tax, notwithstanding she has illegally exempted the capital invested in her bonds; and if we then desire to restore equality as between ourselves and the owners of such bonds, we may resort to legal proceedings against the city or her assessor to compel her to do her duty, and to tax said bonds in the face of her own exemption. If such a disreputable duty is in fact devolved upon her, we prefer she should herself discharge it.

It is further argued that the amount of capital invested in said bonds is so trifling that it should not be allowed to disturb the assessment on our shares. The bonds issued by the city amounted to $500,000. In the case of Gilman *vs.* Sheboygan, above cited, the personal estate illegally exempted amounted to only $300,000

---

[1] 2 Black, 510.
[2] Cooley Con. Lim., p. 521.
[3] Cooley Con. Lim., p. 522, in note.

or $400,000;[1] and in the case of Weeks *vs.* Milwaukie,[2] approved by this Court in the case last cited, the property illegally omitted from the assessment amounted to only $150,000.[3] In that case the Supreme Court of Wisconsin say "omissions in assessments arising from mistakes of fact, erroneous computations, or errors of judgment, on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of these laws does." "If those executing these laws may deliberately disregard them and assess the whole tax upon a part only of those who are liable to pay, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control."[4] In this case, as in that, the omission from the assessment was purposely made under the direction of the common council through their ordinance.

It was also argued in the Court below that the restriction imposed by Congress only relates to taxes "imposed by or under *State* authority," and that municipal corporations are left free to discriminate as they see proper. If the corporation does not impose its taxes "by or under State authority," it has no right to tax our shares at all. Its sole right to impose taxes of any kind is based upon the principle that "the State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers."[5] Whatever is forbidden to the State Government it cannot do indirectly through the local governments,[6] for it cannot confer any greater power than the State itself possesses; and in conferring

---

[1] 2 Black, 518.

[2] 10 Wis., 242.

[3] 2 Black., 516. Cooley Con. Lim., p. 520, 521.

[4] Cooley Con. Lim., p. 515, note 3.

[5] Gilman *vs.* Sheboygan, 2 Black., 515. Cooley, p. 518.

[6] Cooley Con. Lim., p. 198.

its power, the State must observe the restrictions and limitations of the organic law.[1]

III. It is charged in the bill, and admitted by the demurrer, that "by another ordinance passed by defendant's corporation, March 1, 1867, and which is still in force, only one per cent. is assessed for taxes on the *capital* invested in the mercantile business in said city, while complainants are assessed two per cent. upon the value of their shares.

As the argument relative to this ordinance proceeds upon many of the same grounds that we have assumed in discussing the ordinance exempting the capital invested in city bonds from taxation, we need not repeat them here. But it is said that the ordinance refers only to the price which merchants must pay for their *license*, and does not relate to the *tax* which may be imposed upon their capital. We need not, however, go into the nice distinctions that are drawn between what is a license and what is a tax; for if the ordinance is a *tax*, as we contend, it discriminates against us by taxing us twice as much as the merchant; and if it is a *license* and not a tax, then the merchant is not taxed at all, and the discrimination is even worse than before.

ED. BAXTER,

Solicitor for Plaintiffs in Error.

---

[1] Dillon Mun. Corp., p. 560, s. 590; p. 595, note 1. 2 Black., 517.

In the Supreme Court of the United States.

No .....

A. G. ADAMS ET AL.,

PLAINTIFFS IN ERROR,

VS.

MAYOR AND CITY COUNCIL OF NASHVILLE

DEFENDANT IN ERROR.

ED. BAXTER,
Solicitor for Plaintiffs in Error.

A. G. ADAMS ET AL.,

PLAINTIFFS IN ERROR,

vs.

The Mayor and City Council of Nashville,

DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error, who are stockholders in the Fourth National Bank of Nashville, Tennessee, filed their bill in the Chancery Court of that State against the defendant in error, a municipal corporation, to enjoin the collection of a tax imposed upon their shares of stock by said corporation, and to have the tax declared illegal and void.

The bill was demurred to. The Chancellor sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court of Tennessee—the highest court of law or equity in the State—the decree of the Chancellor was affirmed, and thereupon the case was brought to this Court by writ of error under the 25th section of the Judiciary Act.

As several of the questions which were made by the bill were not federal in their character, and the decision of the State Court is conclusive against us upon them, we will only refer here to such questions presented by the record as we think are properly re-examinable by this Court.

We concede the abstract right of the State and its municipal corporations to tax the shares of National Banks, notwithstanding their entire capital may be invested in United States bonds; and the only objections which we make to the tax in question grow out of the supposed conflict of State and Municipal legislation and action with the provisions of the Act of Congress on the subject. We also concede that now the power of State taxation over the shares of National Banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed *upon other moneyed capital in the hands of individual citizens of the State.*[1] It will thus be seen that we do not propose to re-open or re-argue any of the questions that have been decided by this Court upon the subject.

On the 1st of March, 1869, the Legislature of Tennessee passed an act, the only provision of which that we complain of, and therefore the only one that we need here insert, is as follows:

"That no tax shall hereafter be assessed upon the *capital* of any bank, or banking association, or any joint-stock company organized under the authority of this State or of the United States."[2]

On the 18th of April, 1870, the Corporation of Nashville, in contemplation of the issuance of $500,000 of its bonds, passed an ordinance, the second section of which is as follows:

"That said bonds shall be exempt from taxation by this Corporation—this provision being intended as a stipulation in the contract; and said bonds and their coupons, as either mature, shall be receivable by this Corporation for taxes."[3] It is alleged in the bill, and admitted by the demurrer, "that said ordinance was copied upon the back of said bonds, and referred to in their face, and that many thousands of dollars of the moneyed capital of private individuals in said Corporation have been, and are now, invested in said bonds, and thus exempted from all municipal taxes.

---

1 15 U. S. Stat., p. 34.

2 Statutes of Tenn., by Shankland, p. 20, s.9.

3 Laws of Nashville, edition of 1872, by Lellyett, p. 257.

On the 1st day of March, 1867, the Corporation passed an ordinance, which is as follows:

"That hereafter all persons doing a mercantile business of any kind within the City of Nashville shall obtain license from the Recorder before or at the time of beginning such business, paying the fees heretofore charged; and in lieu of the per-centum tax heretofore charged, shall pay in advance *one per centum on the capital invested in such business* during the ensuing year to be used in the purchase of goods, or in making advances on goods or produce, or for any other purpose whatever connected with such business: Provided, that no wholesale merchant, or storage, receiving or forwarding merchant, or commission merchant, shall pay a less sum than one hundred dollars, and no retail merchant a less sum than five dollars."[1]

The bill avers that this ordinance is still in force, and that by virtue of it, all the capital invested in the mercantile business in said city is exempted from all corporation taxes over one per cent.; while plaintiffs' shares of stock are taxed at the rate of two per cent. upon their value.

The State of Tennessee levies a tax on plaintiffs' shares, amounting in the aggregate to three thousand dollars per year; the County of Davidson levies an additional tax of about five thousand dollars per year: and the defendant's Corporation, still another tax amounting to about ten thousand dollars per year. It will thus be seen that if the tax is legally imposed, it will amount in the course of the twenty years for which the bank is chartered to nearly half a million of dollars.

---

[1] Digest City Ordinances, 1868, pp. 147, 148.

A. G. ADAMS ET AL.

vs.

THE MAYOR AND CITY COUNCIL

OF NASHVILLE, TENNESSEE.

STATEMENT OF ERRORS.

The plaintiffs in error insist that the Supreme Court of Tennessee, in the decree rendered in this case, erred upon the following points:

1st. In deciding that the act of the Legislature of the State of Tennessee passed March 1st, 1869, which provides "that no tax shall hereafter be assessed upon the capital of any bank, or banking association, or any other joint-stock company organized under the authority of this State or of the United States," is not repugnant to, nor in conflict with, the provisions or limitations of any statute of the United States, and especially not in conflict with any of the limitations or restrictions of the National Banking Laws.

2d. In deciding that an ordinance of defendant's Corporation, passed on the 18th of April, 1870, providing that five hundred thousand dollars of bonds, then about to be issued by said Corporation for sale, should be exempt from taxation by said Corporation—said provision being intended as a

stipulation in the contract, being copied on the back and referred to in the face of said bonds—is not repugnant to nor in conflict with the provisions or limitations of any statute of the United States, and especially not in confliet with any of the limitations of the National Banking Laws.

3d. In deciding that another ordinance passed by defendant's Corporation March 1st, 1867, providing that only one per cent. shall be assessed for taxes on the capital invested in the mercantile business in said city, while plaintiffs' National Bank shares are assessed two per cent. upon their value, is not repugnant to nor in conflict with the provisions or limitations of any statute of the United States, and especially not in conflict with any of the limitations of the National Banking Laws.

ARGUMENT.

I. The act of Congress requires that the shares of National Banks shall not be taxed by a State "at a greater rate than is assessed upon other moneyed capital *in the hands of individual citizens of such State.*"[1] The act of the Legislature of Tennessee passed March 1st, 1869, provides that no tax shall "be assessed upon the *capital* of any bank, or banking association, or any joint-stock company organized under the authority of"[2] said State. We insist that said capital *is capital in the hands of the individual members or stockholders who own and manage the property of said corporations;* and that as it has been exempted from taxation by the State, our National Bank shares must also be exempted, or they will be taxed at a greater rate than it is taxed.

It will be argued on the other side that the capital exempted by the State belongs to the banks, banking associations, and joint-stock companies; that it is therefore capital in the hands of corporations and not of the individual citizens of said State, and for this reason does not fall within the letter of the act of Congress.

This raises the question as to who is the real owner of property, the naked legal title to which is vested in a corporation.

As remarked by Mr. Justice Nelson, this Court announced but a familiar principal of law, when it held that "the corporation is the *legal* owner of all the property of the bank, both real and per-

[1] 15 U. S. Stat., p. 34.
[2] Statutes of Tenn., by Shankland, p. 20, s. 9.

sonal;[1] and that its capital, in whatever it may be invested, is owned by the bank as a *corporate entity*, and not by the stockholders."[2]

Conceding, as we do, that the bank, as a mere "corporate entity," holds the naked "legal" title to its capital, yet, as decided by the Supreme Court of Tennessee, this legal right is vested in the corporation "to be used and managed in trust *for the benefit of the members;*[3] and, as decided by this Court, while "the directors are the trustees or managing partners," yet *the stockholders are the cestuis que trust, and have a joint interest in all the property and effects of the corporation.*[4]

In another case this Court say that "corporations of this kind are in truth little more than private partnerships," and that "the tendency of the discussions and judgments of the Court of Chancery in Great Britain and of the courts of this country is to concede the existence of a *distinct and positive right of property in the individuals composing the corporation, in its capital* and business, which is subject in the main to the management of the corporation itself."[5] So the Supreme Court of Ohio say that "the *stockholders own the whole fund* managed by the directors as their agents and trustees;"[6] and the Chancellor of New Jersey, speaking of stockholders in a railroad corporation, states the principle thus: "As stockholders, *they own the road in common, each owns a share in the whole,* and is to have a proportionate share in its profits. *They have a right in the road* and in every dollar it earns. The directors are *their* trustees to employ the *joint capital* in the management of the road."[7] In other words, the entire property or capital of the corporation is in equity, and

---

[1] Van Allen *vs.* The Assessors, 3 Wall., 584.
[2] National Bank *vs.* Commonwealth, 9 Wall., 359.
[3] Union Bank *vs.* The State, 9 Yerg., 498.
[4] Koehler *vs.* Black River Falls Iron Co., 2 Black., 721; 3 Paige, 232.
[5] Bacon *vs.* Robertson, 18 Howard, 485, 486.
[6] Taylor *vs.* Miami & Co., 5 Ohio, p. (167.)
[7] Kean *vs.* Johnson, 1 Stockt., 407.

reality owned jointly by the stockholders, though, for convenience, the naked legal title is technically said to be vested in the "corporate entity;" and not only do the stockholders own all the property of a corporation, but they have the ultimate and supreme control of that property. Without their acceptance of the charter it cannot be called into existence; unless they furnish the means, it cannot be put into practical operation. In every sense of the word it is *their* corporation, and the property and capital standing in its name is *theirs*. Under such circumstances, it would be strange indeed if they were not allowed to control and manage its property and affairs. Mr. Walker, in his American Law, says: "The *management* of the affairs of a corporation pursuant to the provisions of the charter must depend upon the votes of the *members;*" though "in business corporations the representative principal is usually adopted, and the immediate supervision is committed to a board of directors elected by the stockholders together with other appropriate officers."[1]

We have it, then, that in reality the stockholders are the owners of the capital of the corporation, and through the directors and officers (as their agents and trustees) they manage and control that capital. Then how can it be said that it is not capital in their hands? We say it is as much so as any capital in the hands of an individual of which he is the real, though only the equitable, owner.

We will also reach the same result by recurring to the elementary definition of a corporation. Chancellor Kent says: "A corporation is a franchise possessed by one or more individuals," and its object is "to enable the members to act by one united will and to *continue their joint powers and property* in the same body undisturbed by the change of members," etc.[2]

Here is a clear recognition that stockholders, though they may

[1] Walker's Am. Law, p. (221), 5th ed.
[2] 2 Kent's Com., p. 268, 12th ed.

contribute their money to the capital of a corporation, still continue their joint powers and property in it. In fact it is expressly said that they own the corporation itself.

Mr. Walker says that corporations consist of natural persons clothed by law with an artificial character and capacity; and he adds that when two or more persons desire to unite their means for the purpose of carrying on some enterprize which neither might be able to accomplish by himself, there are but two legal ways of doing it conveniently. They must either be constituted a corporation by means of a legislative charter, or they must enter into a partnership by virtue of a contract; and though differing in many other respects, "corporations and partnerships both agree in being relations voluntarily assumed by the members, and also in having for their object the association of several individuals for the purpose of co-operation in business."[1] Here we see that a corporation consists of its stockholders in nearly the same sense that a partnership is said to consist of its members; and while the bankrupt system and other laws clearly recognize a distinction between the firm property of the partnership and the separate property of the partners, yet no one will argue that the firm capital is not capital in the hands of the individuals who compose the firm, though technically it may be called the property of the firm.

This Court, in discussing the liability of corporations created by the States, to be sued in the Federal Courts, use this language: "A corporation aggregate is but an artificial *body of men* bound together by the mere corporate name. Citizens cannot exempt themselves from being sued in the Federal Courts by citizens of another State by the fact that the subject of controversy has arisen upon a contract to which they (the citizens) are parties in their corporate and not in their personal character."[2] "The important faculty of being a corporation conferred upon individual

[1] Walker's Am. Law, p. 216, 5th ed.

[2] Louisville Railroad Co. *vs.* Letson, 2 How., (552) (553)

citizens by State legislation for their own convenience cannot be wielded to deprive others of their acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."[1] We submit that this language of the Court is peculiarly appropriate to the position assumed against us—the stockholders being the real owners of the corporate capital, and having the actual management of it through their agents and officers; to exempt that capital upon the technical ground that they own it "in their corporate and not in their personal character," seems to us a "syllogism or rather sophism which deals subtly with words and names without regard to the things or persons they are used to represent."

As, however, our opponents will insist upon a most literal construction of the act of Congress, it may be well to inquire how it can be said with any regard to that mode of construction that capital is "*in the hands*" of a corporation which is said by Chief Justice Marshall to be a mere "artificial being, invisible, intangible, and existing only in contemplation of law"? It may also be well to notice that the act of Congress draws no distinction between individual citizens acting in their "corporate character" and those acting in their "personal character;" and therefore capital which they have in their hands in the one character is as much liable to taxation as that which they have in the other.

We see, then, that whether we adopt a literal or a fair construction of the act of Congress, the result is the same.

If the moneyed capital invested by individuals in a joint-stock company or in a partnership, though used as the capital of the joint concern, must be taxed by the State, how can those same individuals procure its exemption by merely obtaining a charter of incorporation, which may always be had for the asking?

---

[1] Marshall *vs.* B. & O. R. R. Co., 16 How., (327) (328).

If such capital is to be said to be in the hands of the corporation, and by that quibble be exempted from taxation, what would prevent all the individuals in the State from transferring their moneyed capital in trust to the corporations of the State, and by that device avoid all State taxes whatever, and throw the entire burden of the government upon shareholders of National Banks?

And if no capital is to be regarded as within the purview of the act of Congress except such as is literally and physically in the hands of the individuals who really own it, why may not the State now exempt from taxation the moneyed capital of all the minors, lunatics and others, who occupy the relation of *cestuis que trust?*

But it will be said that the capital of National Banks is exempted from taxation by the State as well as the capital of State Banks, and therefore that we should not complain. It is in this very act of apparent fairness that the real evasion is sought to be concealed. The State well knew that, under the National Banking Acts, we are compelled to invest as much as one-third of our capital in United States bonds, and that in fact the whole of it was so invested. The State knew that these bonds were already exempted from taxation by an authority superior to her, and that in her proposal to exempt them, she sustained no loss and we acquired no benefit. The offer was as barren as it was deceptive. On the other hand, she knew that her own banks, banking associations, and other joint stock companies, were not bound to invest a dollar of their capital in United States bonds, and that as a fact it was all invested in other and more profitable securities, which were, however, not exempt from taxation; but in order to place her own institutions upon as good a footing as if their capital was, like ours, invested in Government bonds, she seeks, by offering to exempt our capital, which is already exempt, to procure a similar exemption for their capital, which she had no right to exempt.

It is a well-known fact that Congress, in creating National

Banks, not only had in view the establishment of a sound paper currency for the people, but also to provide safe depositories for the public funds, and, what was still more important, to create a home market for the Government bonds, and thus sustain its credit at the most perilous moment of the nation's life; and for this reason the privilege of banking was offered to the citizens, coupled with the condition that at least one-third of the banks' capital shall be invested in such bonds. It is also well known that a bank cannot make as high a rate of profit on capital invested in Government bonds as it can by many other investments known to commerce, and it is also known that in purchasing such bonds regard is had to their exemption from taxation, and that the Government receives the full value of the exemption in the increased price which it gets for such bonds. Now, Congress did not intend to act with bad faith towards the National Banks, and it did not intend that the States should nullify the exemption by giving all other capital the same benefit; therefore it required that the States should tax all the moneyed capital of their citizens at as high a rate as they assessed upon the National Bank shares. Tennessee has replied to this demand of Congress that she *will* tax all the capital held by her citizens in their *personal* capacity; but that she will *not* tax the capital held by them in their *corporate* capacity; and that she intends to put the latter upon the same footing as the United States bonds in which our capital is invested. We insist that Congress did not intend to allow this to be done, and that it is not fair that it should be done. Congress had the right to exempt the Government bonds from State taxation. We paid the fair value of this exemption in the increased price we gave for the bonds over what we would have given had they not been exempt; and as an equivalent for this, we have a moral as well as a legal right to insist that the State Banks, with whom we are brought in competition, shall pay a tax on the capital employed by them in their business.

If any of their capital is invested in Government bonds, we

are willing that it shall have the same exemption as ours; and so, if any of our capital is invested otherwise than in Government bonds, we are willing to be taxed upon it at the same rate we demand shall be imposed upon theirs. Whatever is taxable should be taxed, whether held by State or National Banks, and whatever is exempt should be exempted, whether held by the one or the other; but where either has paid in advance for the exemption of its capital, the other should not be allowed the same advantage without paying for it at the same rate.

It will be argued that if this Court should hold that the capital of a bank is (within the meaning of the act of Congress) capital in the hands of the individual stockholders who own and control it, and therefore liable to taxation, then, inasmuch as the stockholders in the State Banks are taxed by the State on their shares, it would be double taxation if they were taxed again for the capital of the bank.

To this we might reply that we were compelled to pay in advance for the exemption of our capital from taxes in the increased price we were forced to pay for the Government bonds in which it is invested, and yet that we are also taxed upon our shares of stock by the State.

But in Van Allen *vs.* The Assessors,[1] it was decided that such was *not* double taxation. In that case it was held that the shares of stockholders in a National Bank could be taxed by the State, though all the capital of the bank was invested in exempted Government bonds. Now, if the *shares* of the stockholders had embraced the interest which the stockholders had in the capital of the bank, the shares could not have been taxed at all, as it would have been a tax laid directly upon the Government bonds. It was therefore necessary to hold that a tax upon the *shares* of stockholders in a bank was *not* a tax on *their interest in the capital of the bank,* and consequently the State can tax both without its amounting to double taxation.

---

[1] 3 Wall., 573.

The shares of stock owned by a stockholder are "a distinct independent interest or property held by him like any other property that may belong to him;"[1] a property that he owns in his "*personal* character" *separate* from his associate stockholders as well as from the corporation, and to which he has both the legal and equitable title. But as we have before shown the interest which stockholders have in the capital of the corporation is a *joint* interest as between themselves; an interest which they own in their "*corporate* character," and to which they have only an *equitable* title—the naked legal title, as above stated, standing in the name of their "corporate entity," and their management of it being exercised through their agents and officers.

We also know as a fact that the shares of stock in a corporation have a separate value of their own in the market, depending almost entirely upon the character of the dividends which they are known to pay—neither the stockbroker nor the tax assessor ever in fact look beyond the dividends declared and the market quotations to arrive at its value. In the case of Van Allen *vs.* The Assessors, it was argued that the State assessor must institute an inquiry into the investment of the capital of the bank and ascertain what portion was invested in United States bonds exempted from taxation, and make a proper discrimination in the assessment of the shares; but this Court held that such was no part of his duty.[2] If, then, the assessor has no right, in assessing the shares of stock, to look into the investment of the capital of the bank to see whether it is exempt or non-exempt, nor whether it has been increased by good management or wasted by bad management; in a word, if he cannot look into the character or condition of the capital for any purpose, it is impossible for him to embrace the stockholders' interest in the capital in the assessment which he makes upon their shares. In fact the Court say in so many words that a tax on the shares of stock is not a tax on the capital of the bank.[3]

---

[1] Van Allen *vs.* The Assessors, 3 Wall., 584.
[2] 3 Wall., 588. [3] 3 Wall. 583, 584.

It may be said, however, that the case of The People *vs.* The Commissioners,[1] decided by this Court, is an authority against us; but an examination of the precise questions passed upon in that case will show that it is not.

The first point decided was that the shares in banks, whether State or National, were liable to State taxation without regard to the fact that the capital of such banks was invested in the exempted bonds of the United States. In our case we make no such point, but concede that our shares are liable to be taxed by the State, notwithstanding all the capital of our bank is invested in such bonds.

Second: In that case it appeared that the Insurance Companies incorporated under the laws of New York *were* subject to taxation *on their capital*, and that the State assessors in taxing their *capital* deducted from their assessment such United States bonds as formed part of said capital. It further appeared that the said assessors made similar deductions in assessing the individual citizens of New York upon their moneyed capital; and it was insisted for the plaintiffs in error that this discriminated against the shareholders of National Banks and in favor of Insurance Companies and individuals, by refusing to make to the former the same allowance as was made to the latter on account of investments in United States bonds, whereby the former were assessed at a greater rate than the latter upon the moneyed capital in their hands. This Court decided, however, that the meaning of Congress was that National Bank shares should not be taxed at a greater rate than was imposed by the State upon such of the moneyed capital of the individual citizen as was subject or liable to taxation; that it was not intended to drive the States to the absurdity of imposing a tax upon that part of such capital as was invested in bonds which were exempted from taxation, and therefore that the assessors did right in assessing the *capital* of Insur-

[1] 4 Wall., 244.

ance Companies as well as of individuals to deduct therefrom such securities as were exempt from taxation.

That these were the only two points decided by the Court is evident, both from the opinion of the Court and the syllabus of the learned reporter.

In that case the entire capital of the Insurance Companies liable to be taxed was taxed by the laws of New York. In this case none of the capital of the State Banks, banking associations, etc., is taxed by the State of Tennessee.

In that case it was contended that in assessing the capital of the Insurance Companies, the exempted United States bonds held as part of that capital should be taxed. In this case we concede that such part of the capital of the State Banks, etc., as is invested in United States bonds cannot be taxed, and we only insist that such part of it as is not so invested shall be taxed. In other words we are insisting in this case that the capital of State Banks shall be taxed on precisely the same principle that the capital of Insurance Companies was taxed by the State in that case.

The position assumed in this case was not argued in that case, nor passed upon by the Court; and the facts of the two cases are so directly opposite, that a decision could scarcely be made in one that would be binding authority in the other.

It is true that Mr. Justice Nelson does say in the course of his opinion that the act of Congress does not refer to the rate of assessment upon *Insurance* Companies as a test by which to prevent a discrimination against National Bank shares, and that it is confined to the rate of assessment upon moneyed capital in the hands of individuals; that *Insurance* Companies were not within the words or contemplation of Congress, and that there was not much danger to be apprehended of a discrimination in their favor prejudicial to the rights of individual citizens.[1] We have already conceded that the test is to be confined "to the rate of assesment upon moneyed capital in the hands of individuals;" but we say

[1] 4 Wall., 257, 258.

that the capital of the State Banks is capital belonging to and in the hands of the individuals who are the stockholders thereof; and if so, it is immaterial, under the act of Congress, whether they own it in their corporate or personal character.

And while it may be true that *Insurance* Companies were not within the words or contemplation of Congress, and were not apt to be favorites with the State Legislature as against the citizens of the State, yet it is evident that State Banks and banking associations were within the contemplation of Congress, and while even they as corporations might not be favorites with the State Legislature as against the individual citizens of the State, yet their stockholders would be favorites as against the stockholders of National Banks; and no better evidence of it could be afforded than the attempt on the part of the State of Tennessee to give the shareholders in her State Banks the same benefit of exemption on the capital of their banks as if it was, like ours, invested in bonds of the United States.

II. We insist that our bank shares are taxed by the Corporation of Nashville at a greater rate than the moneyed capital which her individual citizens have invested in the five hundred thousand dollars of bonds issued by said Corporation, which bonds are exempted from municipal taxation by special ordinance of the city, passed April 18th, 1870.

It is admitted by the demurrer that said ordinance was copied upon the back of said bonds, and was referred to in their face; and, as stated in the ordinance itself, was intended as a stipulation in the contract.

But it is now argued for the Corporation that it had no power to pass such an ordinance; that it had no right to agree that said bonds should be exempted, and therefore the exemption being void, the bonds are in fact liable to taxation by the Corporation.

Will the Corporation be heard to make this defense after having sold its bonds to those whom it knew were buying on the

faith of the exemption? In a case where a corporation raised the question of *its power under its charter* to guaranty the bonds of another corporation, which bonds had passed into the hands of *bona fide* holders who relied on the validity of the guaranty, this Court said that "a corporation quite as much as an individual is held to a careful adherence to truth in their dealings with mankind, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced";[1] and the Supreme Court of Tennessee quote and apply the same language to a municipal corporation of that State.[2] So, this Court held that when the authorities of a city or town had treated a place as a public street, taking charge of it and regulating it as they did other streets, they could not, when sued for an injury caused by their negligence in regard to it, defend themselves by alleging *want of authority* in establishing the street.[3] After the city has received the value of the exemption in the increased price of its bonds, it would be grossly unjust to allow her to insist that she had no right to make it. We submit, however, that the corporation had the power to exempt said bonds from taxation.

It is well settled that a *State* may pass laws exempting property from taxation, which shall operate as contracts, and as such be irrepealable.[4] It is also well settled that the Legislature may delegate to municipal corporations the power of local taxation;[5] and as the power to exempt from taxation necessarily arises from the power to tax, it follows that such a corporation has the same power to exempt property from its taxes that the State would have were it acting directly instead of through the corporation as its delegated agent.

---

[1] Zabriskie *vs.* C. C. & C. R. R., 23 How., 381.
[2] Adams *vs.* M. & L. R. R., 2 Cold., 662.
[3] Mayor *vs.* Sheffield, 4 Wall., 189.
[4] Sedgw. Stat. and Con. Law, p. 628 and 629. Cooley Con. Lim., p. 127.
[5] Cooley Con. Lim., p. 191.

But it is said that the amended charter of the city, passed in 1868, requires "that all property and estate, real, personal or mixed, situated or belonging in said city, which is subject to State taxes shall be assessed and listed for taxation," etc., and that this expressly deprives the corporation of the power to exempt its bonds from taxes. The bonds were not in existence when that charter was passed, and therefore not embraced by it. They were not issued until two years afterwards, and then the exemption was made a stipulation in the contract.

It might well be doubted whether the clause in the charter was intended by the Legislature to do more than give the *power* to tax all kinds of property; but even in those States where provisions are inserted in their constitutions to insure uniformity, and where they are so worded as clearly to forbid gratuitous exemptions, yet the Courts "recognize the power in the Legislature to commute for a tax *or to contract for its release for a consideration.*[1] Such a provision is found in art II., sec. 28, of the Constitution of Tennessee, adopted in 1870, ordaining that "all property, real, personal or mixed, shall be taxed;" and to the same effect was the same article and section in the Constitution of 1834, to wit: that "all property shall be taxed according to its value," etc.;[2] yet our statute books since 1834 are full of charters exempting the property of corporations from taxation, and the validity of such exemptions has always been recognized by our Supreme Court.[3]

But it will be argued that if the exemption is valid, and by virtue of it the city has disabled herself from taxing the capital invested in said bonds, this of itself is a sufficient reason why she should not be required to tax them as a condition precedent to her right to tax our shares. In other words, that Congress does not require of her an impossibility.

---

[1] Cooley Con. Lim., p. 517.

[2] Statutes of Tennessee, by Shankland, pp. lvii., lviii., and note *a*.

[3] Union Bank *vs.* The State, 9 Yerg., 490, cited and approved in 1 Sneed, p. 119; 1 Heisk, 284.

This Court did decide, in Lionberger *vs.* Rouse,[1] that where a State had, by contract entered into *long prior to the passage of the National Banking Act*, disabled herself from taxing two of her banks beyond a certain amount, it was not a bar to her right to collect a tax on National Bank shares for a greater amount. But this case is entirely different. The act of Congress regulating the right to tax such shares was passed June 3, 1864; and with full knowledge of its provisions, the Corporation of Nashville, by contract made in 1870, voluntarily disabled herself from taxing the capital invested in her bonds. There is no countenance in the decision of this Court for the assumption that a State or corporation may first evade the act of Congress by entering into a disabling contract, and then plead such contract as a justification of the evasion. The city had the right, as a financial question, to decide which was most to her interest—to get an increased price for her bonds, by exempting them from taxation, or to forego this advantage and tax the National Bank shares within her jurisdiction. She had the right to do either, but she could not do both; and having made her election, she must abide by it.

Suppose, however, that contrary to our views, this Court should hold that the Corporation had no right to make the exemption which it assumed to make, and therefore that the capital invested in said bonds is in fact legally liable to taxation, and should be taxed by the city like all other property; then we have a case where hundreds of thousands of dollars of the moneyed capital of her individual citizens which is legally liable to taxation, and which it is the duty of the city to tax, is omitted from her assessment, not by a mere oversight, but in obedience to her own ordinance deliberately made for that purpose.

The question, whether other capital is legally or illegally exempted from the State or corporate assessment, is immaterial; the test imposed by Congress is that our shares shall not be taxed

---

[1] 9 Wall., 468.

"at a greater rate than is (*as a matter of fact*) assessed upon other moneyed capital," etc.

In the case of Gilman *vs.* City of Sheboygan[1] a special tax was levied upon the real estate in the city, but the personal property of the value of $300,000 or $400,000 was exempted from the tax. This Court decided that, under the Constitution of Wisconsin, the Legislature had no power to make this discrimination in favor of the personal property, and that its attempted exemption was illegal and void; and upon the very ground that the exemption of the personal estate was illegal, they held that the tax levied upon the real estate was "utterly void." So Mr. Cooley says, that "wherever a tax is invalid because of excess of authority, or because the requisites in tax proceedings which the law has provided for the protection of the taxpayers are not complied with, any sale of property based upon it will be void also."[2] Those "safeguards which the Legislature has thrown around the estates of citizens to protect them against unequal, unjust and extortionate taxation, the Courts are not at liberty to do away with by declaring them non-essential."[3] But in this case the city asks that we be made to pay our tax, notwithstanding she has illegally exempted the capital invested in her bonds; and if we then desire to restore equality as between ourselves and the owners of such bonds, we may resort to legal proceedings against the city or her assessor to compel her to do her duty, and to tax said bonds in the face of her own exemption. If such a disreputable duty is in fact devolved upon her, we prefer she should herself discharge it.

It is further argued that the amount of capital invested in said bonds is so trifling that it should not be allowed to disturb the assessment on our shares. The bonds issued by the city amounted to $500,000. In the case of Gilman *vs.* Sheboygan, above cited, the personal estate illegally exempted amounted to only $300,000

---

[1] 2 Black, 510.
[2] Cooley Con. Lim., p. 521.
[3] Cooley Con. Lim., p. 522, in note.

or $400,000;[1] and in the case of Weeks *vs.* Milwaukie,[2] approved by this Court in the case last cited, the property illegally omitted from the assessment amounted to only $150,000.[3] In that case the Supreme Court of Wisconsin say "omissions in assessments arising from mistakes of fact, erroneous computations, or errors of judgment, on the part of those to whom the execution of the taxing laws is entrusted, do not necessarily vitiate the whole tax. But intentional disregard of these laws does." "If those executing these laws may deliberately disregard them and assess the whole tax upon a part only of those who are liable to pay, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control."[4] In this case, as in that, the omission from the assessment was purposely made under the direction of the common council through their ordinance.

It was also argued in the Court below that the restriction imposed by Congress only relates to taxes "imposed by or under *State* authority," and that municipal corporations are left free to discriminate as they see proper. If the corporation does not impose its taxes "by or under State authority," it has no right to tax our shares at all. Its sole right to impose taxes of any kind is based upon the principle that "the State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers."[5] Whatever is forbidden to the State Government it cannot do indirectly through the local governments,[6] for it cannot confer any greater power than the State itself possesses; and in conferring

---

[1] 2 Black, 518.

[2] 10 Wis., 242.

[3] 2 Black., 516. Cooley Con. Lim., p. 520, 521.

[4] Cooley Con. Lim., p. 515, note 3.

[5] Gilman *vs.* Sheboygan, 2 Black., 515. Cooley, p. 518.

[6] Cooley Con. Lim., p. 198.

its power, the State must observe the restrictions and limitations of the organic law.[1]

III. It is charged in the bill, and admitted by the demurrer, that "by another ordinance passed by defendant's corporation, March 1, 1867, and which is still in force, only one per cent. is assessed for taxes on the *capital* invested in the mercantile business in said city, while complainants are assessed two per cent. upon the value of their shares.

As the argument relative to this ordinance proceeds upon many of the same grounds that we have assumed in discussing the ordinance exempting the capital invested in city bonds from taxation, we need not repeat them here. But it is said that the ordinance refers only to the price which merchants must pay for their *license*, and does not relate to the *tax* which may be imposed upon their capital. We need not, however, go into the nice distinctions that are drawn between what is a license and what is a tax; for if the ordinance is a *tax*, as we contend, it discriminates against us by taxing us twice as much as the merchant; and if it is a *license* and not a tax, then the merchant is not taxed at all, and the discrimination is even worse than before.

ED. BAXTER,

Solicitor for Plaintiffs in Error.

---

[1] Dillon Mun. Corp., p. 560, s. 590; p. 595, note 1. 2 Black., 517.

A. G. ADAMS *et als*, PLAINTIFFS IN ERROR,

vs.

MAYOR & CITY COUNCIL OF NASHVILLE, DEF'TS IN ERROR.

—o—

ARGUMENT OF COUNSEL

FOR

DEFENDANTS IN ERROR.

—o—

Deeming it unnecessary to present any statement of the case or preliminary remarks, we proceed to consider the alleged errors assigned on behalf of the plaintiff in error in their order:

I. The first objection assigned as error is answered by quoting more fully the act of Assembly of March 1, 1869, which provides:

"SEC. 9. *Be it further enacted*, That no tax shall hereafter be assessed upon the capital of any bank or banking association, or any other joint stock company organized under the authority of this State, or of the United States; but the stockholders in such banks and banking associations, or other corporations, shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of State, county or municipal taxes at the place, town, ward or district where such bank or banking association, or other corporation, is located, and not elsewhere, whether the said stockholder reside in said place, town, ward or district or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in the State; *And provided further*, That nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, or other corporation; but the same shall be subject to State, county, municipal and other

taxation, to the same extent and rate, and in the same manner, as other real estate is taxed.

"SEC. 10. *Be it further enacted*, That every individual banker doing banking business under the laws of this State, is hereby required to declare upon oath before the assessor, the amount of capital invested in such banking business, and each one hundred dollars of such capital, for the purpose of this act, and for the purpose of taxation, shall be held and regarded as one individual share in such banking business, and such shares are hereby declared to be personal property. If such banker have partners, he shall declare upon oath before the assessor, the number of shares held by each of them in such banking business, ascertained as above provided; and the shares so held by any partner, shall be included in the valuation of his taxable property in the assessment of all taxes levied in the city, town, ward or school district, where such individual banker is located, and not elsewhere; and such individual banker shall pay the same and make the amount so paid a charge in his account with such parties; and if such individual banker have no partners, he shall be held to be sole owner of all the shares in such business of banking, and the same shall be included in the valuation of his personal property in the assessment of all taxes levied in the city, town, ward or school district where his bank is located, and not elsewhere."

It may be observed that the provision of this act complained of (§ 9) is copied from the act of Legislature of New York, as set out on page 245 of 4 Wallace, in the People *vs.* Commissioners; and is also identical with the act of the Legislature of Illinois, as set out on page 493 of 19 Wallace, in Tappan *vs.* Merchant's National Bank. And therefore it has been twice held by this court to be not in conflict with the limitations of the act of Congress.

It is hardly necessary further to remark, that the provision complained of is simply a provision against double taxation; because the shares of stock in the hands of all the stockholders, assessed at their value, represent the property of the corporation, even including the real estate owned by such corporation. The policy of taxing the real estate of such corporation, although the value of the same has already been included in the assessment of the shares, is in following of the precedent of the national law, and may have some substantial reason to support it, not necessary to be here inquired into. *This* double taxation of the State banks

and other corporations to the extent of their real estate, preserves strictly their equality in this respect with the National Banks, which are allowed to be so taxed by the national law.

The somewhat elaborate argument of the counsel of the plaintiffs in error on this point, might have better *color* of application to the question involved, if the provision that no tax shall be levied on the capital of corporations were not coupled with the further provision that the tax shall be levied on the shares of stock. What he complains of is, not that National Bank stocks are taxed at a higher rate than other moneyed investments; but that the latter are not taxed *twice*, while the former are taxed but *once*, The limitations of the national law only intend that the National Bank stocks shall not be taxed at a higher rate than other moneyed investments (4 Wall, 256). They do not intend a discrimination *in favor* of the former, but equality or no discrimination *against* them.

Under the law of Tennessee above quoted, no person can escape the taxation of his capital (as argued) by investing it in a corpotion; because such investment will give value to the shares of stock in such corporation, and thus it will become taxable, and be taxed. If the capital so invested be not divided into shares the law (§ 10) provides for its division for such purpose.

But the Constitution of Tennessee (of 1870) expressly provides, that "all property, real, personal or mixed, shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational; and shall except one thousand dollars' worth of personal property in the hands of each tax payer, and the direct products of the soil in the hands of the producer and his immediate vendee All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value."—*Const. of Tenn., Art.* 3, § 28.

"The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation "—*Ibid. Art* 3, § 29.

And then the Act of Feb. 25, 1870 (ch. 81 of Acts of 1869-70), section 1, provides:

"SECTION 1. "That from and after the passage of this Act, all real estate other than such as is property exempted from taxation by section five hundred and forty-two (542) of the Code;* also, all personal property, to-wit: stallions, mares, geldings, mules, jacks, jennets, neat cattle, sheep and hogs, exceeding in value the sum of one thousand dollars, also all moneys secured by mortgage or deed of trust, money in actual *or constructive possession*, money due from solvent debtors, whether by bond, bill single, promissory notes or judgments; also all articles of agreement for the payment of money and accounts on solvent parties, bearing interest, owned or possessed by any person or persons whatsoever, except for notes or bills for work and labor done; also all shares of stock in any bank, institution or company now or hereafter incorporated by or in pursuance of any law of this State, or of any other State, and *all public bonds or stocks whatsoever*, other than bonds of the United States, which by the laws of the United States are expressly exempt from taxation, all incomes from bonds and stocks which are exempted from taxation by the laws of the United States, or State of Tennessee, and all money loaned or *invested* at interest in this State, or any other State or Government, including money of orphans, legatees and distributees under twenty-one years of age, where the respective amounts belonging to each legatee or distributee are over one thousand ($1.000), also all household and kitchen furniture, including golden and silver plate, owned by any person or persons, corporation or corporations, where the value thereof shall exceed the sum of five hundred dollars; also gold and silver watches and jewelry, all pleasure carriages and buggies of two or four wheels, upon their actual value; all salaries and emoluments or fees of office, when the amount exceeds $500; *together with all other sources of revenue, and property, real and personal*, now taxable by the laws of this State, except what is exempted by this Act,† shall be valued and assessed, and subject to taxation for all State and county purposes."

This was the state of the law in 1870-71, when the taxation complained of was imposed. The Act above quoted is one of the very

---

* This exemption applies only to real estate.

† There are no exemptions provided for in the act other than those provided for in this section as here quoted.

acts referred to and complained of in the Bill of plaintiffs in error, and the above quoted section repeals the exemption of State, County and Corporation bonds, in Act of March 1, 1869, as is expressly decided by the Supreme Court of Tennessee in its decree in this cause, (Record marginal pp. 38, 39.) In consequence of which, plaintiffs in error have left this objection out of their assignment of errors. This act requires all investments of moneyed capital to be taxed at precisely the same rate as that imposed upon the shares of national bank stock. If the argument of the learned counsel of plaintiffs in error, on this point, is not fallacious, and the taxation of shares of stock in corporations is not equivalent to the taxation of their capital stock, though technically not the same, then such capital stock *is* taxed under this law, and plaintiffs in error ought to be content. For the Legislature, after saying that all "money in actual or constructive possession" shall be taxed—and "all public bonds or stocks whatsoever" shall be taxed—and every thing else in the way of personal property it can think of to enumerate, shall be taxed—and without any exemption whatever as to personal property—still, out of abundant caution, adds, "together with all other *sources of revenue* and property;" and says these shall be taxed. Now, if the capital stock of corporations is property, or a source of revenue, then this act requires it to be taxed. And it proceeds in the next section, as the Constitution requires, to levy upon all alike the same rate of taxation. So, then, if the taxation of the shares of stock is not equivalent to taxation of the capital stock of a corporation, the law requires it to be taxed; and I repeat, plaintiffs in error ought to be content on this point. It was this section which was held by our Supreme Court expressly to repeal the exemption of State, County and Corporation bonds from taxation; and if so, it must also repeal any exemption in the same act, of the capital stock of corporations, if they were exempted by it. In fact, there was no such exemption in the act of March 1, 1869. But whereas, formerly, the tax was in some cases levied upon the capital stock, and not on the shares, the provision is, that thenceforth the tax shall be levied on the shares, and not on the capital stock.

II. The second error assigned is, that the corporation of Nashville, by an ordinance, exempted $500,000 of its own bonds from taxation; and therefore this disturbs the equality of taxation between other moneyed investments and National Bank stocks. It should be remarked, that the bill does not charge that in fact the

assessor does not include any such of said bonds as may be held by the citizens of Nashville, in his assessment of their personalty, *as he is required by law to do*; and that they in fact are not taxed by the city; but it quotes the ordinance, alleges as a fact that many thousands of the capital of the citizens is invested in said bonds, adding "and thus exempted from all municipal taxes,'

The answer to this objection, is:

1st. That in fact said bonds are not exempt from taxation. Formerly the charter of the city authorized the corporate authorities "to levy and collect taxes upon all property taxable by law for State purposes." But, on the 16th of March, 1868, the Legislature, by an act, took this power out of the hands of the said authorities, so far as it related to the taxation of *property*—making in said act the fullest and most detailed provision for such taxation. The first section of said act, (which continues still in force) provides: "That all property and estate, real, personal, or mixed, situated or belonging in said city, which is subject to State taxes, *shall be assessed* and listed for taxation therein, at the fair and full worth and market value and price of the same."

The 2d and 3rd sections give specific directions as to the manner of arriving at the value of certain kinds of property, etc. The 4th section provides for the appointment and qualification of an assessor and assistants, and that and following sections to and including the 9th, prescribe the duties of these officers, with the minutest particularity. Other sections provide for the appointment of a collector, and prescribe his duties in like manner, with the utmost particularity, leaving nothing respecting taxes upon property for the disposal of the corporate authorities—except that section 10 requires said authorities at a certain time, and in a certain manner, to fix the rates of taxation for its several corporate purposes for the current year; and the act imposes and confers some other strictly subordinate duties and powers upon the council to facilitate the proper execution of the law. The act no where confers any discretion on the authorities of the corporation to exempt from taxation any property made taxable by said first section.

Therefore, the Supreme Court of Tennessee, in this case decreed: "that the attempt of the City Corporation, by its ordinance to exempt its own bonds from taxation, cannot operate to disturb the equality of the assessment of all property for taxation, according to its value, as provided by the constitution and laws of this State," (Rec. marg. p. 39).

In the short note of the opinion of the Supreme Court, appended to the Record, the Court says on this point (marg. p. 43): "The Corporation probably had no authority to exempt its bonds from taxation. The taxes are to be assessed under the acts of the Legislature"—referring particularly to the act above referred to and quoted, and a copy of which in full will be found in the City Digest of the Laws of Nashville, herewith filed, and to which the Court is respectfully referred. (p. 66.)

2d. "But if it did, adds the Court, this does not affect the present tax." It is submitted that beyond question *this* honorable Court has twice at least decided the same thing.

In the People *vs.* Commissioners, 4 Wallace, 244, (see on p. 256) it is held that the conformity required is to the rate of taxation imposed upon such moneyed investments as are taxed in the hands of individual citizens; and that the local taxing power is not by the limitation of the national law stripped of authority to make special exemptions for reasons of public policy—made in good faith, and not intended as discriminations against the investments in National Bank stock. And the precise question is decided by this Court, in an able opinion, delivered by the Chief Justice, in Hepburn *vs.* School Directors, 23 Wallace, 480, (see on p. 485). There the exemption was not as in our case invalid. But mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate, though taxable for State purposes, were exempted from the municipal tax, while shares of National Bank stock were subjected to both. The suit was brought to test the right of the municipality to collect the tax on the latter, while the former was exempt. And this Court held that an exemption of some part of the moneyed investments in the hands of citizens, would not entitle the National Bank stocks to exemption. "It could not," says the Court, "have been the intention of Congress to exempt bank shares from taxation, because *some* moneyed capital was exempt."

But I repeat the attempted exemption is invalid, and is so decided by our Supreme Court. This decision being upon a construction of our own State laws, will be held conclusive by this Court. It is remarkable that the learned counsel of plaintiffs in error, has considered such ruling conclusive on another similar point, but not on this. In the original bill the objection is raised that by an act of March 1, 1869, (not the one which provides for the tax on shares) "All State, county and corporation bonds" are exempted from tax-

ation. (See Record marginal p. 12.) But our Supreme Court, in its decree in this cause, (Rec. marg. p. 38-9) held that it was "of opinion that the exemption of State, county and corporation bonds by the act of the General Assembly of the State of Tennessee, passed March 1, 1869, was repealed by subsequent legislation, so as not to be operative upon the taxes levied for the years 1870 and 1871, and thereafter," and thereupon plaintiffs in error, taking this ruling as conclusive, have abandoned the objection, not assigning it in error; but the very next sentence of the decree, upon a like construction of our own laws, holds the attempted exemption by the city of its own bonds to be inoperative, because in conflict with the law of the State, yet this objection is still insisted upon, and assigned as error.

The argument that the city shall be estopped to deny its obligation to exempt its bonds from taxation, would be more plausible, if the city had the power to either tax or exempt *any* property. But, under the law, it has neither. The State law levies all its taxes upon property, and provides for their collection and disposition; and the proceedings complained of by the Bill of plaintiffs in error, are not under any corporation ordinance, but under the State law.

III. The third and last error assigned, is, that "by another ordinance passed by defendant's corporation March 1, 1867, and which is still in force, only one per cent. is assessed for taxes on the *capital* invested in the mercantile business of the city," while plaintiffs in error are taxed two per cent. upon the value of their shares. This, it is pertinently argued is *admitted by the demurrer*. The learned counsel may well feel the need of such an admission, upon discovery of the mistake; but as the mistake is of law and not of fact, it is not admitted. If this is a tax upon property, it is repealed or abrogated by the State law passed over one year later. We have already quoted in full the first section of the act of Assembly of March 16th, 1868, (Dig. of Laws of Nashville, p. 66,) which makes all the provisions respecting the assessment and collection of the municipal taxes on property. The 1st section, as before shown, provides for the assessment of *all* property, real, personal and mixed. The 2d section provides, "that the valuation" in such assessment, "of a stock of merchandise, or in trade, of any person or company, ... shall be of the average capital, ... employed, or used, or operated upon during the previous year." This act intends that the merchant shall be

taxed to the amount which is levied upon other personal property, upon his average capital. And the mode of ascertaining it is regulated. It is to be the average capital used by him during the previous year—it being impossible to ascertain how much capital he may use by loans and credits during the year which is to follow. Thus he is taxed as high as the national bank stock, not only on his capital, but upon that of which he may have availed himself by the use of his credit. And then, in addition to this, the corporation ordinance, passed a year before the State statute, if not repealed by the latter but still in force, imposes upon the merchant another tax, not as a property tax, but as a privilege tax, which shall be one per cent upon his capital. The ordinance in question will be found on p. 215 Laws of Nashville, herewith filed, under the head of "Merchants' Licenses." The section complained of reads as follows:

"SECTION 1. That hereafter all persons doing a mercantile business of any kind within the City of Nashville, *shall obtain license* from the Recorder before, or at the time of beginning such business, paying therefor the fees heretofore charged; and in lieu of the per centum tax heretofore charged, shall pay in advance one per centum on the capital invested in such business during the ensuing year, to be used in the purchase of goods or in making advances on goods or produce, or for any other purpose whatever connected with such business: *Provided*, That no wholesale merchant or storage, receiving or forwarding merchant, or commission merchant shall pay a less sum than one hundred dollars, and no retail merchant a less sum than five dollars. Confectioners shall take out license as other merchants, and give bond and pay in like manner."

But, not only so—and if the crushing taxation of the mercantile class in Tennessee already shown, be insufficient for the contentment of the plaintiffs in error, it is proper to add that the 28th section of Art. 3 of the Constitution of Tennessee, after making provisions for the uniform taxation of property quoted in the foregoing part of this argument, immediately adds: "But the Legislature may tax merchants, peddlers and privileges, in such manner as they may from time to time direct."

And thereupon the Legislature has proceeded to impose upon the merchants "an *ad valorem* tax upon the capital invested in their business, equal to that levied on all taxable property," and then divers special taxes; and then in addition to these, "they shall be

liable and required to pay a license tax equal to the *ad valorem* tax." (Thompson & Steger's Code §§ 682 b to 682 f inclusive.) So, following the example of the State Legislature, the City Council, still retaining a power to levy taxes upon privileges, but not upon property, imposes upon the merchant a privilege tax of one per cent. over and above the *ad valorem* tax provided by the 2d section of the Act of Assembly of March 16, 1868, for municipal corporation purposes—which latter alone is equal to the tax upon the shares of plaintiffs in error for like purposes. The merchant is thus taxed by our laws on his capital employed, just the same rate as that imposed on national bank shares and all other property. And besides divers smaller burthens, is also subjected to a privilege tax to the State equal to his property tax. For corporation purposes he is taxed on capital as a property tax the same as national bank shares and other property; and in addition one per cent. as a privilege tax. Thus the merchant is loaded down with cumulative taxation in Tennessee, resulting in a resistence in the courts, the clamor of which must have reached the ears of the learned counsel

JOHN LELLYETT,
Solicitor for Def'ts in Error.

J. E. Bradley